No. 91-1809

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,

Petitioners

v.

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and WENNER FORD TRACTOR, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 11, 1992

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QUESTIONS PRESENTED

1. Does the Seventh Amendment allow federal appellate review of a district court's denial of a motion to set aside a jury's award of punitive damages?

2. "In performing the limited function of a federal appellate court", operating under "the strictures of the Seventh Amendment", did a panel of the Third Circuit improperly substitute its own judgment for the jury's and interfere with the jury's proper role in violation of the Seventh Amendment, and did the panel fail to apply "proper deference to the district court", when the panel reversed the district court's denial of motions in "a classic jury case" to set aside the jury's factual findings that (a) *two* respondents defrauded petitioners; (b) the facts constituted "outrageous conduct" warranting punitive damages; (c) respondents' conspiracy substantially harmed competition in relevant, "well-defined" product and geographic *"submarkets"* in violation of antitrust laws; and (d) petitioners were entitled to compensatory damages in the amount, and in accordance with petitioners' "understanding", as determined by the jury?

3. Where the opinion filed by the Third Circuit's panel included flagrant and material errors in stating what the jury found, what the district court decided, and its own conclusions, tainting a confused opinion and exposing fatal flaws in appellate decision-making, some of which errors the panel corrected by subsequent amendments, and where the panel requested and relied upon respondents' post-trial motions and memoranda, but declined to receive petitioners' briefs in opposition, should not this Court exercise its power of supervision, reverse the panel's decision, and affirm the district court's decision in all respects, in the interest of justice to correct plain errors and fundamental unfairness in the panel's judicial proceeding?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the parties to the proceeding below were *Petitioners* Tunis Brothers Company, Inc., Richard N. de la Rigaudiere and David C. Smith; and *Respondents* Ford Motor Company, Ford Motor Credit Company, Wenner Ford Tractor, Inc., John S. Wenner, John Watson, Douglas N. Crawford, Eugene W. Fraher, E. S. Hasel, Hugh Nickel, Kenneth E. Harris, and C. W. Wenzel.

The District Court dismissed all the individual defendants named herein as respondents except John S. Wenner, in whose favor the jury returned a verdict. Petitioners believe that none of the individual respondents has any interest in the outcome of this Petition except for John S. Wenner in his capacity as an officer, director and stockholder of respondent Wenner Ford Tractor, Inc. The only respondents with a direct interest in the outcome of this Petition are the three corporate respondents.

Pursuant to Rule 29.1, petitioner Tunis Brothers Company, Inc. has no parent company and no subsidiary company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Tunis Brothers Company, Inc., Richard N. de la Rigaudiere, and David C. Smith respectfully pray that a writ of certiorari issue to review the Amended Judgment and the Opinion of the United States Court of Appeals for the Third Circuit, which Opinion was filed December 27, 1991 and amended on January 10 and 24, 1992. The Amended Judgment was entered January 10, 1992. An Order denying a petition for rehearing was entered on February 11, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (*"Tunis Brothers III"*), which was filed December 27, 1991 and is the subject of this Petition, is reprinted in the Appendix hereto at A-1 to A-64.[1] The Third Circuit's amendments to its Opinion are reprinted in the Appendix at A-65 to A-71. The Opinion and amendments thereto have not been officially reported. The Opinion as finally amended in certain very significant respects is reported at 952 F. 2d 715 (3d Cir. 1991). The unreported order of the Third Circuit filed February 11, 1992 denying a petition for rehearing is reprinted at A-150 to A-152.

The unreported Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, filed December 3, 1990, is reprinted at A-73 to A-92, and the District Court's Order, entered September 27, 1990, denying respondents' post-trial motions, is reprinted at A-93.

In *Tunis Brothers Company, Inc. v. Ford Motor Company,* 587 F. Supp. 267 (E. D. Pa. 1984) the District Court granted summary judgment on the antitrust counts in favor of defendants (the respondents herein) and dismissed the common law counts. Twice the Third Circuit reversed the summary judgment, reinstated the common law counts, and remanded the case to the District Court for trial on all counts. *Tunis Brothers Company, Inc. v. Ford Motor Company,* 763 F. 2d 1482 (3d Cir. 1985)(*"Tunis Brothers I"*), judgment vacated and remanded to the Third Circuit "for further consideration in light of *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U. S. 574 (1986)", 475 U.S. 1105 (1986); *Tunis Brothers Company, Inc. v. Ford Motor Company,* 823 F. 2d 49 (3d Cir. 1987)(*"Tunis Brothers II"*), *cert. denied,* 484 U. S. 1060 (1988). The Third Circuit's opinion in *Tunis Brothers I*

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1. References to the Appendix hereto, which is separately bound, are cited herein as "A- ".

is reprinted in the Appendix at A-96 to A-139, and its opinion in *Tunis Brothers II* is reprinted at A-141 to A-148.

JURISDICTION

The Amended Judgment of the Third Circuit (A-157 to A-158) which petitioners seek to have the Court review was entered on January 10, 1992. A timely petition for rehearing was denied on February 11, 1992 (A-150 to A-152). This Court has jurisdiction pursuant to 28 U. S. C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Seventh Amendment* to the Constitution of the United States of America provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Petitioners brought this antitrust action pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) by reason of respondents' alleged violations of Section 1 of the Sherman Act (15 U.S.C. §1) which provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent,

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

In 1982 petitioners commenced this federal antitrust action (with fraud and other common law claims) against respondents Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), Wenner Ford Tractor, Inc. ("Wenner Ford") and certain individuals. This action was brought in the United States District Court for the Eastern District of Pennsylvania which has jurisdiction under Section 4 of the Clayton Act, 15 U.S.C. §15.

This is the third time in seven years that a decision of the United States Court of Appeals for the Third Circuit in this *Tunis Brothers* case has come before this Court on a petition for a writ of certiorari. Twice before the petitioners were the defendants below seeking review of the Third Circuit's reversal of summary judgment entered against plaintiffs by the District Court. Now the petitioners are the plaintiffs below seeking review of a post-trial decision of a different panel of the Third Circuit disagreeing with the jury's verdicts on liability and damages in favor of plaintiffs in what the District Court called "a classic jury case" (App. 3525)[2] and reversing the District Court's denial of judgment n.o.v. on most issues, all in a confused opinion (A-1 to A-92) fatally tainted by certain flagrant and material errors, reflecting adversely on the opinion's validity, which the Panel subsequently tried to correct by amendment (A-65 to A-70) only after counsel brought these errors to the Panel's attention (A-159).

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2. References to "App." are to the Appendix in the court below.

Tunis Brothers Company, Inc. ("Tunis Brothers") was a profitable tractor dealer in Kennett Square, Pennsylvania, the "Mushroom Capital of the World", under a franchise agreement with Ford for 22 years, until Ford terminated its franchise in April 1981 after Mr. and Mrs. Richard M. Tunis, the owners of Tunis Brothers, sold the business to their nephew and employee, Richard N. de la Rigaudiere ("de la Rigaudiere") and to their friend, David C. Smith ("Smith").

Petitioners alleged that Ford and Ford Credit conspired with Wenner Ford and the individual defendants to terminate the authorized Ford tractor dealership of Tunis Brothers and to deny and refuse to give a new Ford tractor franchise to Tunis Brothers and its new owners in Kennett Square to eliminate or substantially decrease competition with Wenner Ford, a dealer development company which Ford had helped recently to establish nearby and in which Ford had a very substantial financial interest. Petitioners alleged that this was all in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act. Petitioners further alleged that respondents employed fraud and trickery against them in doing all this and used dirty business tricks in defrauding each of them.

Petitioners' profitable tractor business was thereby destroyed. Petitioners claimed injuries to their business and property in the amount of $7,724,357. They sought treble damages from respondents under Section 1 of the Sherman Act and Section 4 of the Clayton Act. Petitioners also sought punitive damages, as well as compensatory damages, under their state common law fraud count.

A jury trial in this case began on November 15, 1988 and ended on February 1, 1989 with the Honorable Louis C. Bechtle, now Chief Judge of the District Court, presiding. The issues of liability and damages were bifurcated at trial.

On December 16, 1988 the jury answered eight written interrogatories on liability (A-160 to A-163). The

jury found that Ford and Ford Credit had conspired with Wenner Ford "to terminate the authorized Ford tractor dealership of plaintiff Tunis Brothers Company, Inc. and to reject the application of plaintiffs Richard N. de la Rigaudiere and David C. Smith for a new Ford tractor franchise for Tunis Brothers in Kennett Square"; that the relevant product market in this case was "Ford tractors only"; that the relevant geographic market in this case was "the 'Kennett Square area' as defined by plaintiffs in their Exhibit P-302"; that "the conspiratorial conduct of the defendants substantially harm[ed] competition in the 'relevant market' "; that "the harm to competition in the relevant market [was] greater than any beneficial effects on competition in the relevant market"; that defendants' conduct caused injury to all three plaintiffs; that Ford "secure[d] through fraud the unconditional resignation of Richard M. Tunis contrary to his intention" [thus facilitating the termination of the Ford tractor franchise of Tunis Brothers]; and that both Ford Motor Company and Ford Motor Credit Company "defrauded plaintiffs in connection with their application for a new Ford franchise in Kennett Square and for approval by Ford Motor Credit Company".

Following trial on damages, on February 1, 1989 the jury returned a verdict of $227,605.50 against Ford, Ford Credit and Wenner Ford on the antitrust claim. The District Court trebled that to $682,816.50 and entered judgment in that amount against them "jointly and severally". On the state fraud claim, the jury returned a verdict of $227,605.50 apportioned $159,323.85 against Ford and $67,281.65 against Ford Credit. Further on the state fraud claim, the jury answered an interrogatory on punitive damages as follows: "In what sum, if any, is Tunis Brothers Company, Inc. entitled to recover punitive damages from the below named defendants: Ford Motor Company – $2,800,000; Ford Motor Credit Company – $1,200,000" (A-165).

In determining compensatory damages, the jury found, in answering interrogatories (A-164 to A-165), that when Tunis Brothers applied for a Ford tractor dealer franchise it was "the understanding of plaintiffs that the tractor dealer franchise would be awarded at the Kennett Square location of Tunis Brothers Company, Inc. *indefinitely*", and that Tunis Brothers "suffered damages from loss of profits caused by the failure of . . . Ford Motor Company to grant Tunis Brothers . . . a Ford tractor dealer franchise at its Kennett Square property *for an indefinite period commencing April, 1981, but not to exceed ten years*" in the sum of $227,605.50 (A-164 to A-165)(Emphasis added).

On September 27, 1990, Chief Judge Bechtle entered an Order denying respondents' post-trial motions for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur (A-93). On December 3, 1990 he filed his supporting "Memorandum and Order" (A-73 to A-92).

Respondents appealed from the District Court's Order denying their post-trial motions. A new Panel of the Third Circuit heard argument on June 27, 1991. On December 27, 1991 the Panel filed its Opinion (A-1 to A-64) in which it reviewed and weighed the evidence, disagreed with the jury and the trial judge on all issues except one, and held:

1. "[T]he evidence did not support the jury's finding of a Ford tractor only product market" and "[b]ecause the testimony does not indicate that the relevant product market was limited only to Ford tractors, we conclude that the relevant product market consisted of Ford and other comparable tractors" (A-23). Further, "plaintiffs' evidence did not establish that the relevant geographic market was limited to the Kennett Square area", as the jury found (A-27). Therefore, "we conclude that plaintiffs have failed to show that Ford Motor exercised market power . . . [and] caused an unreasonable restraint of trade that implicated an injury to competition" (A-28). The Panel therefore reversed and directed the

District Court "to grant judgment n.o.v. in favor of all the defendants on the antitrust claim" (A-30).

2. "We will affirm the order of the district court denying Ford Motor and *Wenner Ford's* motion for judgment n.o.v. on the fraud claim" (A-63). "[W]e conclude that the trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor *and Wenner Ford*" (A-38). "This evidence clearly supports the jury's determination that Ford Motor *and Wenner Ford* committed a fraud against the plaintiffs" (A-42). [Emphasis added.][3]

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3. This Panel of the Third Circuit was clearly correct in affirming the jury's finding that *Ford Motor Company* defrauded petitioners and the District Court's order denying Ford's motion for judgment n.o.v. on petitioners' fraud claim.

Furthermore, petitioners believe that the jury *should have* returned a verdict against *Wenner Ford* on fraud liability and for punitive damages. But, it did not. And *Wenner Ford* made no motion for judgment n.o.v. on the fraud claim and the District Court did not, of course, deny a motion that *Wenner Ford* did not make.

In addition to the errors quoted above about Wenner Ford's alleged fraud liability, the Panel erroneously stated in its Opinion at A-63 and A-64:

> "We will therefore remand this action for a new trial on compensatory damages against Ford Motor *and Wenner Ford* on the fraud count." [Emphasis added.]

Though the Panel tried to correct these flagrant and material errors by amendment (A-65 to A-70) after counsel brought these errors to the Panel's attention (A-159), they cannot be dismissed as merely clerical or typographical errors. These errors taint the entire Opinion and raise very serious questions about the validity of the Opinion and its conclusions, about whether or not the Panel had sufficient comprehension of all the facts and issues here to justify the conclusions expressed in its Opinion.

Another error in the Court's Opinion which the Panel failed to correct is its statement at A-3 that Tunis Brothers obtained a jury verdict of "*$4 million in punitive damages* against the defendants, Ford Motor Company, Ford Motor Credit *and Wenner Ford Tractor, Inc.*" The fact is that the jury did *not* award any punitive damages against Wenner Ford.

The inevitable questions are: What other misstatements or

3. Though the Panel properly devoted some 12 pages of its Opinion (A-31 to A-42) reviewing relevant evidence and applicable law in support of its correct conclusion that "the trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor" (A-38), it took the Panel only 35 lines (A-42 to A-43) to conclude erroneously that "A different result is required with respect to the fraud verdict against Ford Credit, because as a matter of law, the plaintiffs have not established that Ford Credit perpetrated a fraud on the plaintiffs" (A-42). "Accordingly, because there is no evidence to suggest that Ford Credit committed any fraud against the plaintiffs, we will reverse the judgment against Ford Credit on the fraud count, remanding this issue to the district court for judgment to be entered in favor of Ford Credit" (A-43). Neither the evidence nor the law supports that conclusion.

4. The Panel reversed and "vacate[d] the award of punitive damages in its entirety" (A-63) because, in its opinion, the evidence did not constitute "the requisite outrageous conduct for punitive damages" (A-58 to A-63) notwithstanding the jury's finding to the contrary following very detailed and accurate instructions by the trial judge on punitive damages, the need for outrageous conduct and its meaning, and notwithstanding the District Court's post-trial opinion "that the jury's finding of outrageous conduct was sufficiently supported by the evidence" (A-92).

5. Notwithstanding the jury's finding (A-164 to A-165) that, when Tunis Brothers applied for a Ford tractor dealer franchise it was "the understanding of plaintiffs that the tractor dealer franchise would be

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omissions of fact or evidence, what other errors in fact or conclusions of law were made or missed by the Panel in its erratic and flawed Opinion?

Can the Amended Opinion of the Third Circuit's Panel, as laundered, cosmeticized and reported in 952 F. 2d 715 (3d Cir. 1991), cover up these revealing flaws in appellate decision-making?

awarded at the Kennett Square location of Tunis Brothers Company, Inc. *indefinitely*", and that Tunis Brothers "suffered damages from loss of profits caused by the failure of . . . Ford Motor Company to grant Tunis Brothers . . . a Ford tractor dealer franchise at its Kennett Square property *for an indefinite period* commencing April, 1981, but *not to exceed ten years*" in the sum of $227,605.50 (A-164 to A-165) – and notwithstanding the District Court's post-trial decision that "*This was a quintessential question of fact to be determined by the jury*" (A-91) – the Panel of the Third Circuit held that "the record does not sufficiently substantiate a ten year period of time. Thus, upon remand, the compensatory damages evidence must be limited to that two to three year period of time dating from the 1981 franchise termination" (A-47).

6. The Panel remanded "this action for a new trial on compensatory damages against Ford Motor and Wenner Ford [*sic*] on the fraud count" (A-63 to A-64). "The evidence of lost *gross* profits was too speculative to support an award of damages. Therefore, we will grant a new trial on compensatory damages in which the plaintiffs shall be entitled to produce evidence pertaining to net lost profits and which shall account for actual results in the market place rather than those based purely on outdated and speculative predictions" (A-57). The Panel thus reversed the District Court which held that "The determination of damages was a question for the jury. The court does not find that the jury's award of compensatory damages was so excessive or speculative as to warrant reversal" (A-91).[4]

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4. The District Court further stated: "[A]s the Supreme Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123-24 (1969): '[D]amage issues in [antitrust] cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts . . .' Accordingly, courts have permitted evidence of lost gross profits where incremental operating expenses in connection with increased sales would have been nominal. [Citing cases from 5th, 6th, 7th and 9th circuits and district court

* * *

On October 23, 1991 (two months before the Third Circuit's Panel filed its Opinion in this *Tunis Brothers III* case on December 27, 1991), the Clerk of the Third Circuit wrote a letter (A-167) to the attorneys for Ford, Ford Credit and Wenner Ford stating:

> This will confirm our telephone call to each of you today. The Court wishes you to supply it with four (4) copies of all your motions (with supporting legal memoranda) for judgment n.o.v. or a new trial. These should be received in the Clerk's office by Monday, October 28, 1991.

Upon receiving a copy of that letter, counsel for petitioners Tunis Brothers, *et al.* delivered a letter to the Clerk (A-168) on October 25, 1991 referring to the Clerk's letter of October 23, 1991 and asking:

> Would the Court want me to supply copies of the legal memoranda or briefs in opposition to those motions filed on behalf of the plaintiffs with the District Court? If so, the Court would then have before it the same legal memoranda, pro and con, which Judge Bechtle had before him and which he considered when he denied those motions. Please let me know.

Notwithstanding two subsequent telephone inquiries made of the Clerk's Office by petitioners' counsel concerning the Court's response, no response was ever

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cases in the 3rd circuit.]

"Plaintiffs' evidence of lost gross profits was submitted to the jury, along with defendants' evidence and arguments that net profits was the proper formula. The jury accepted neither parties' calculation as to compensatory damages but, instead, reached a compromise verdict. Given the conflicting damage evidence at trial, the court does not believe that the evidence presented to the jury was incorrect as a matter of law. The jury's verdict on compensatory damages under the antitrust claim will not be set aside" (A-89 to A-90).

given by or on behalf of the Court to petitioners' counsel. This lack of response clearly indicated that the Court was not interested in how and what petitioners had responded to respondents' post-trial motions in the District Court. As the Panel knew from petitioners' principal Brief on appeal (p. 40), petitioners had filed with the District Court on June 30, 1989 a 180-page brief entitled "*Plaintiffs' Brief in Opposition to Defendants' Post-Trial Motions*". The Panel wanted to see only what *defendants* had argued in the District Court in support of their post-trial motions. The Panel did not want to see *plaintiffs'* briefs and arguments in response.

Was this fair? Was this the way a fair and impartial court should proceed? Was this the accepted and usual course of judicial proceedings? Does this call for an exercise of this Court's power of supervision?

On October 28, 1991, counsel for Ford Motor Company, *et al.* filed with the Third Circuit voluminous post-trial memoranda and briefs together with two volumes of a supporting Appendix.

With respect to the Panel's holding that "the record does not sufficiently substantiate a ten year period of time" for petitioners to stay in Kennett Square (A-46 to A-47), the Panel obviously relied upon what respondents had briefed extensively and erroneously in the memorandum they had submitted to the District Court, because they had not briefed this issue on appeal. If the Panel had requested or received "*Plaintiffs' Brief in Opposition to Defendants' Post-Trial Motions*" filed with the District Court, the Panel could have read pages 134-149 thereof analyzing the testimony at trial showing that, after petitioners met with Ford's agents on March 3, 1981, it was petitioners/plaintiffs' understanding that they could stay in Kennett Square "indefinitely" instead of only two or three years as they thought previously. The jury so found. The District Court so held stating: "This was a quintessential question of fact to be determined by the jury" (A-91).

REASONS FOR GRANTING THE WRIT

I. This case enables the Court to review and define further "the limited function of a federal appellate court" operating "under the strictures of the Seventh Amendment" and "proper deference to the district court" as in *Browning-Ferris*, but where a federal appellate court reversed the district court's denial of motions to set aside a jury's findings.

This Seventh Amendment case presents the Court with the rare and much needed opportunity to define further and implement "the limited function of a federal appellate court" operating "under the strictures of the Seventh Amendment" and "applying proper deference to the District Court" specified by this Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U. S. 257, 277-280 (1989). The Third Circuit did not heed this Court's cautions. Its recent decision in *Tunis Brothers III* is in conflict with *Browning-Ferris*.

Like *Browning-Ferris*, our present case involves federal antitrust and state tort counts on which the jury awarded compensatory damages. In both cases the jury also awarded substantial punitive damages on the state claims and the District Court denied motions for judgment notwithstanding the verdict, a new trial, or remittitur.

In *Browning-Ferris* the United States Court of Appeals for the Second Circuit affirmed the judgment both as to liability and as to damages. This Court affirmed.

To the contrary, in our *Tunis Brothers* case now before this Court on a petition for a writ of certiorari, the United States Court of Appeals for the Third Circuit reversed the District Court's denial of judgment n.o.v. on respondents' antitrust liability, on the state fraud liability of Ford Motor Credit Company (affirming the state fraud liability of Ford Motor Company) and on punitive damages which the Third Circuit "vacate[d] . . . in its entirety". In addition, the Third Circuit

ordered a new trial on compensatory damages against Ford Motor Company. (A-63 to A-64).

In *Browning-Ferris* this Court stated in relevant part (with emphasis added) at 492 U. S. 277-280:

> Petitioners also ask us to hold that this award of punitive damages is excessive as a matter of federal common law. . . . *It is not our role to review directly* the award for excessiveness, *or to substitute our judgment for that of the jury.* Rather, *our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion* in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. *Applying proper deference to the District Court,* the award of punitive damages should stand.
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> Review of the District Court's order involves questions of both state and federal law. In a diversity action, or in any other lawsuit where state law provides the basis of decision, *the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.* Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals. See *Donovan v. Penn Shipping Co.*, 429 U. S. 648, 649-650 (1977); see also 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice, ¶59.04[l] (2d ed. 1987).
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> In reviewing an award of punitive damages, *the role of the District Court* is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. *The Court of Appeals should then review the District Court's*

determination under an abuse-of-discretion standard.[25] [See *infra* for the Court's note 25]. Although petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of *proportionality* between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, *these are matters of state*, and not federal, *common law*. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues. For obvious reasons we decline that invitation.

In performing the limited function of a federal appellate court, we perceive no federal common-law standard, or compelling federal policy, which convinces us that we should not *continue to accord considerable deference to a district court's decision not to order a new trial.*[26] [Note 26: This is particularly true because *the federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.*] . . . [W]e are convinced that [the Court of Appeals'] conclusion that there was no abuse of discretion by the District Court is consistent with federal standards, in light of the broad range of factors Vermont law permits juries to consider in awarding punitive damages.

* * *

In addition to the other reasons expressed or implied in this Petition for granting the writ of certiorari in this *Tunis Brothers* case, Note 25 to this Court's Opinion in *Browning-Ferris* makes clear that this case is *cert-worthy*. This Court stated in Note 25:

> We have never held expressly that the *Seventh Amendment* allows appellate review of a district court's denial of a motion to set aside an award as excessive. ***Although we granted certiorari in two cases in order to consider the issue***, in both instances we found it unnecessary to reach the question when we decided the case. See *Neese v. Southern R. Co.*, 350 U. S. 77 (1955)(even assuming appellate review power under the *Seventh Amendment*, Court was not justified in reversing denial of new trial on the particular facts of the case); *Grunenthal v. Long Island R. Co.*, 393 U. S. 156, 158 (1968)(same). In light of the result we reach today, we follow the same course here. 492 U. S. at 279.

* * *

The Third Circuit's rulings on various issues in the *Tunis Brothers* case now before this Court were summarized at pages 7-10 *supra*, and will be discussed more fully *infra* with respect to punitive damages and other issues. However, even a quick reading of the Third Circuit's opinion (A-1 to A-64) will disclose that the Panel of the Third Circuit which heard and decided *Tunis Brothers III* and which filed this erratic opinion paid no attention to the "strictures of the Seventh Amendment" or to "the limited function of a federal appellate court" when it reversed the District Court's denial of judgment n.o.v. on almost everything, showing no deference to the District Court whatever, and substituting its own judgment for that of the jury on facts and factual conclusions. Nowhere did the Panel state that the District Court abused its discretion. In essence, the Panel simply ignored the experienced trial judge (who presided over many weeks of trial testimony and other evidence) and his well-reasoned and persuasive Memorandum opinion (A-73 to A-92) supporting his denial of

respondents' post-trial motions for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur.

If this opinion of the Third Circuit is permitted to stand – with a substitution of Panel judgment for jury judgment on so many factual issues – *there is no point to trial by jury in the Third Circuit or elsewhere*. That will be just a waste of time. This opinion demonstrates contempt for jury verdicts and disregard for the judgment and discretion of the District Court. Unlike this Court in *Browning-Ferris*, the Panel in this *Tunis Brothers* case did *not* remember that "the federal courts operate under the strictures of the Seventh Amendment" and the Panel was obviously not "reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury".

The Panel gave initial lip service to applicable standards of appellate review and then ignored them completely. If the *Seventh Amendment* can ever be violated by judicial review, the Panel violated it in this case. Because this Panel of the Third Circuit has gone so far in violating applicable standards and appellate guidelines, its Opinion now presents a bona fide, fundamental issue of whether or not this Panel has violated the *Seventh Amendment* of the Constitution of the United States. A writ of certiorari should be granted for this reason alone. How far can a federal appellate court go without violating the Seventh Amendment? Perhaps the Third Circuit wants to know.

A judgment n.o.v. "raises the constitutional question of possible infringement of the Seventh Amendment, which forbids re-examination of any fact tried by a jury, 'in any Court of the United States other than according to the rules of common law'." 5A J. Moore & J. Lucas, Moore's Federal Practice ¶50.07[1] (2d ed. 1992) "[T]he constitutionality of the judgment n.o.v. is dependent on adherence to the standards limiting the power of the courts to invade the province of the jury. The

standards for granting a motion for judgment n.o.v., on which the constitutionality of such action depends, are the same as those governing the direction of a verdict." *Id.* at ¶50.07[1] and [2].

Forty-nine years ago, Justice Black wrote a memorable dissenting opinion in *Galloway v. United States*, 319 U. S. 372, 396-411 (1943), concurred in by Justices Douglas and Murphy, on the importance of the Seventh Amendment and its "judicial erosion". Professor Moore has described it as "an eloquent defense of the jury". 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice ¶38.08[5.-1] (2d ed. 1991). Justice Black wrote in part:

> The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty. [Note: [T]his Court has on occasion warmly praised this mode of trial: "The right of jury trial in civil cases at common law is *a basic and fundamental feature of our system of federal jurisprudence* which is protected by the Seventh Amendment. *A right so fundamental and sacred to the citizen*, whether guaranteed by the Constitution or provided by statute, *should be jealously guarded by the courts*." *Jacob v. New York*, 315 U. S. 752 (1942).] * * *
>
> *Today's decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.* (319 U. S. at 397) * * * Today the Court comes dangerously close to weighing the credibility of a witness and rejecting his testimony because the majority do not believe it.

The story thus briefly told depicts the constriction of a constitutional civil right and should not be continued. (319 U. S. at 405) * * *

"Trial by jury is a fundamental guaranty of the rights of the people, and *judges should not search the evidence with meticulous care to deprive litigants of jury trials.*"

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. *Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain.* * * * *So few of these cases come to this Court* that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases *a judge should*, in obedience to the command of the Seventh Amendment, *not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert* to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances. (319 U. S. at 407) [Emphasis added.]

* * *

Three years ago, in *Browning-Ferris* this Court reaffirmed the vitality of the Seventh Amendment and the need for judicial restraint when it emphasized "the

limited function of a federal appellate court" operating "under the strictures of the Seventh Amendment" and "applying proper deference to the District Court".[5] The Court seemed to have Justice Black's admonitions in mind. Because the District Court, the Court of Appeals and this Court all affirmed, in effect, the jury's verdict in *Browning-Ferris*, there was no need there for this Court to say more than it did about those judicial restrictions.

This *Tunis Brothers* case, now before the Court on our petition for a writ of certiorari, is different. Though the District Court respected the jury's verdict in this "classic jury case", the Court of Appeals did *not*. This Court now has the opportunity, if it grants a writ of certiorari, to review the Third Circuit's negative holdings and reversals in this case in light of the "strictures of the Seventh Amendment" and "the limited function of a federal appellate court". A decision and Opinion by this Court in *Tunis Brothers* can then define further "the limited function of a federal appellate court" and tell all federal appellate courts how much they must defer to a district court's denial of post-trial motions to upset a jury's verdict and how far they can go in reviewing jury verdicts without violating the Seventh Amendment.

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5. In *Anderson v. Bessemer City*, 470 U. S. 564, 574-5 (1985), a Rule 52(a) case, the Court stated: "The rationale for *deference* to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.' "

II. The Third Circuit improperly substituted its own judgment for the jury's and failed to apply proper deference to the District Court in reversing its denial of motions to set aside the jury's findings that both Ford and Ford Credit defrauded petitioners and that the facts constituted "outrageous conduct" warranting punitive damages against both.

After a trial of many weeks, during which a great deal of testimony and other evidence was produced, the jury in this case found that Ford Motor Company and Ford Motor Credit Company had defrauded the petitioners; that Tunis Brothers Company, Inc. was entitled to compensatory damages in the amount of $227,605.50, apportioned $159,323.85 against Ford and $67,281.65 against Ford Credit; and that Tunis Brothers was also entitled to recover punitive damages from them in the amount of $4,000,000, apportioned $2,800,000 against Ford Motor Company and $1,200,000 against Ford Motor Credit Company.

In denying respondents' post-trial motions for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur (A-73 to A-93), the District Court sustained the jury's verdict of fraud liability against both Ford and Ford Credit. Further, the District Court ruled that the compensatory damages awarded on petitioners' fraud claim was sufficiently supported by the evidence, was not incorrect under Pennsylvania law and was not "so excessive or speculative as to warrant reversal".

Finally, the District Court stated: "[W]hether defendants' fraud was so outrageous as to warrant punitive damages was a question for the jury . . . The court believes that the jury's finding of outrageous conduct was sufficiently supported by the evidence" (A-91 to A-92).

On appeal, a Panel of the United States Court of Appeals for the Third Circuit affirmed the fraud liability of Ford Motor Company (A-31 to A-42; A-63), but

reversed the District Court's denial of judgment n.o.v. against Ford Credit (A-42 to A-43; A-63).

The Third Circuit "conclude[d] that the *trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor*" (A-38) and that the *"evidence clearly supports the jury's determination that Ford Motor . . . committed a fraud against the plaintiffs"* (A-42).[6]

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6. Very briefly, these are the facts supporting the jury's finding that Ford Motor Company *and Ford Motor Credit Company* defrauded petitioners Tunis Brothers Company, Inc., Richard N. de la Rigaudiere and David C. Smith.

In 1980 de la Rigaudiere and Smith informed Ford that they were negotiating with Mr. and Mrs. Tunis to purchase Tunis Brothers, a profitable Ford tractor dealer in Kennett Square, Pennsylvania for 22 years, and that they wanted to retain the Ford franchise there. They then learned that Ford wanted to give the Kennett Square territory to nearby Wenner Ford Tractor, Inc., in which Ford had a very large financial interest, after Mr. Tunis retired or died. However, Eugene W. Fraher, then Ford's Northeastern District Manager (and, unknown to petitioners, also the Senior Vice President and a director of Wenner Ford) told them that they could have the Ford franchise in Kennett Square for two or three years if they would then move Tunis Brothers to Cochranville some miles away.

After Fraher received a letter from petitioners in January 1981 informing him that petitioners would conclude soon their purchase of Tunis Brothers, he sent two Ford representatives, including Hugh Nickel, to meet with petitioners and Mr. and Mrs. Tunis on March 3, 1981 at Tunis Brothers' place of business in Kennett Square. Nickel told them that, before Ford could act upon petitioners' new application to operate Tunis Brothers as a Ford dealership *in Kennett Square,* it was first necessary for Mr. Tunis to sign an *unconditional letter of resignation and termination notice* on behalf of Tunis Brothers as a Ford dealer and to mail it to Nickel at Ford Motor Company immediately after settlement.

Nickel emphasized that this resignation and termination letter would *not* be acted upon or made effective *until* the application of petitioners, the new owners of Tunis Brothers, for a Ford franchise in Kennett Square was *approved* which, Nickel assured and reassured them, *would be approved.* In the meantime, Nickel stated, this resignation and termination letter would be "kept in a drawer". Nickel talked only about Kennett Square. Cochranville was not even mentioned.

Nickel gave petitioners blank application forms he asked them to sign for *Ford Motor Company* (for a Ford franchise in Kennett Square) and for *Ford Motor Credit Company* (for credit), which they did. Nickel stated that he would have the forms typed up in his office with the information petitioners gave him, and would then return the typed applications to them for their review before submitting them to Ford and Ford Credit. Nickel told petitioners that Ford and Ford Credit would approve these applications. Petitioners never saw these papers again before Nickel submitted them, notwithstanding his promise.

Subsequently, after their applications had been rejected by Ford and Ford Credit, petitioners discovered that Nickel had, in completing the applications signed by them in blank, supplied false financial information about them, stating that they were only investing $2,500 each in Tunis Brothers whereas, in fact and as they had informed Nickel at their meeting, they were each investing $25,000.

Relying upon Nickel's assurances, petitioners and Mr. and Mrs. Tunis closed the purchase and sale of Tunis Brothers on March 16, 1981 and mailed the *unconditional* resignation and termination notice to Nickel. Upon receiving this, Nickel and Fraher requested Ford to "accept dealer resignation" of Tunis Brothers *"immediately"*. At the same time, Nickel sent petitioners' applications, with false investment information he had inserted, to Howard W. Stoneback, Jr., Ford Credit's branch manager. When Stoneback telephoned Nickel to inquire about the very small investment reflected by the credit application, Nickel confirmed this and told Stoneback that Ford's tractor division did not want petitioners approved. Stoneback then immediately telephoned Nickel's superior at Ford to say that he was *strongly* recommending to Stoneback's superior at Ford Credit that it reject petitioners' credit application. Stoneback knew that Ford Credit's rejection of credit would trigger a denial by Ford Motor Company of a tractor franchise for Tunis Brothers under its new ownership. The very next day, April 2, 1981, Ford mailed Tunis Brothers a letter "accepting" Tunis Brothers' "termination" of its Ford tractor franchise "in accordance with your letter dated March 17, 1981".

Despite the assurances of approval Nickel gave petitioners at their meeting on March 3, 1981, Nickel submitted to Ford a very *negative* written report on that meeting and on petitioners with negative recommendations concerning their application. Nickel recommended that Tunis Brothers' franchise should be terminated especially if Ford Credit refused a line of credit (App. 4103).

Though the Third Circuit properly devoted 12 pages of its Opinion (A-31 to A-42) reviewing relevant evidence and applicable law in support of its correct conclusion about the fraud liability of Ford Motor Company, it took the Third Circuit only 35 lines (A-42 to A-43) to conclude *erroneously* that "A different result is required with respect to the fraud verdict against Ford Credit,

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NOTES *(Continued)*

Stoneback testified (App. 1831), with respect to Ford Credit's practice and procedure in securing applications to Ford Credit from prospective Ford tractor dealers, that "What really happens is that the Ford Tractor people [like Nickel] take the applications from the dealer and they are responsible to submit those applications to Ford Credit for our review." This made Nickel *the authorized agent of Ford Motor Credit Company* (even though he was a paid employee of Ford) with actual authority from Ford Credit to secure petitioners' credit application and to submit it to Ford Credit. The credit application forms were supplied by Ford Credit.

Nickel's misrepresentations to petitioners that their credit application, which they signed in blank, would accurately state the financial information they gave Nickel, would be returned to them for review before being submitted to Ford Credit, and that Ford Credit would approve their application for credit, were therefore the misrepresentations of Ford Motor Credit Company.

It is the law of Pennsylvania that "a principal is liable to innocent third parties for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances of his agent committed in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them." *Aiello v. Ed Saxe Real Estate, Inc.,* 508 Pa. 553, 499 A. 2d 282, 287 (1985).

"Whether an agency relationship exists is *a question of fact for the jury.*" *Bolus v. United Penn Bank,* 363 Pa. Super. 247, 259, 525 A. 2d 1215, 1221 (1987), *app. denied,* 518 Pa. 627 (1988). " 'The fact of agency and the scope of the power of an agent are questions for the court, where the authority is created by an instrument in writing; *but* where such authority is to be implied from the conduct of the parties, or where the agency is to be established by witnesses, *the fact and scope of the agency are for the jury.*' *Waldron v. Aetna Casualty & Surety Co.,* 141 F. 2d 230, 234 (3d Cir. 1944), quoting *Singer Manufacturing Co. v. Christian,* 211 Pa. 534, 540, 60 A. 1087, 1088." *Browne v. Maxfield,* 663 F. Supp. 1193, 1198 (E. D. Pa. 1987).

because as a matter of law, the plaintiffs have not established that Ford Credit perpetrated a fraud on the plaintiffs."

We turn now to the jury's award of *punitive damages* against Ford Motor Company and Ford Motor Credit Company in the total amount of $4,000,000 which the Third Circuit "vacate[d] . . . in its entirety" (A-64)(*i.e.*, judgment n.o.v.) even though, according to the Panel's Opinion (A-58): "Ford Motor and Ford Credit assert that the punitive damages award of $4 million is unwarranted *and seek relief in the form of a new trial or remittitur*" [Emphasis added.]

First, the Panel stated: "Because we will reverse the judgment against Ford Credit on both the fraud *and antitrust [sic!]* counts, we will set aside that $1.2 million portion of the punitive damages award attributed to Ford Credit" (A-58). [Emphasis added.]

Noting correctly that "the legal and factual prerequisite for an award of punitive damages is *outrageous conduct*" (A-59), the Panel then improperly substituted its own opinion and judgment for the jury's judgment and verdict and stated *erroneously:* "The evidence in this case clearly did not meet that level of outrageous or malicious conduct required to sustain an award of punitive damages" (A-61). "Lacking the basis of outrageous conduct, an award of punitive damages cannot stand. We will vacate the award of $2.8 million in punitive damages against Ford Motor" (A-63).

Contrary to the Panel's statement that "plaintiffs assert that the jury's verdict of liability on the fraud count sufficiently establishes outrageous conduct for punitive damages" (A-60), we never said that even though it is true that Pennsylvania's leading case of *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, at 130, 464 A.2d 1243, at 1263 (1983) stated that "it is difficult to picture a fact pattern which would support a finding of intentional fraud without providing proof of 'outrageous conduct' to support an award of punitive damages. We note that other jurisdictions,

while agreeing with the above standard [punitive damages based upon "outrageous conduct" as stated in §908 of Restatement (Second) of Torts], have found that fraudulent misrepresentation by itself is sufficient to uphold an award of punitive damages because of the state of mind rendering it fraudulent."

The respondents have admitted in a Brief filed by them with the Third Circuit[7] that *the District Court's "instructions to the jury regarding punitive damages [were] consistent with current Pennsylvania law".*

Chief Judge Bechtle's instructions to the jury in this case on *punitive damages* are certainly very clear and very correct. See App. 3741-2, 3759-62.[8]

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7. "The Court's instructions to the jury regarding punitive damages, while consistent with current Pennsylvania law, provided inadequate guidance for the jury." *Brief of Appellants Ford Motor Company and Wenner Ford Tractor, Inc.*, dated February 19, 1991, page 49, note 23.

8. Following closing arguments on damages, Judge Bechtle instructed the jury in part (App. 3741-2)[Emphasis added]:

"Question No. 5 is in respect to punitive damages. Up to this point, members of the jury, I have been referring to compensatory damages . . . You have already determined that the defendants, Ford Motor Credit Company and Ford Motor Company, engaged in fraudulent conduct. You are now permitted, *although you are not required*, you are permitted, to decide whether, in addition to compensatory damages, there should be what we call punitive damages awarded in favor of the plaintiffs by either or both of these companies. You should consider them separately in this regard.

Unlike compensatory damages, punitive damages are intended to *punish and deter* that sort of conduct.

Merely because there was fraud doesn't automatically mean that the plaintiffs are entitled to punitive damages. In addition to that, the plaintiffs must have demonstrated to you that the conduct was *outrageous*, that is, conduct that could be said to either rise out of behavior that was *either willful, or malicious, or reckless or oppressive.* And if you conclude that the conduct was of that category, you have the discretion to determine the extent to which punitive damages should be awarded.

In deciding that, you can consider a number of facts. You can consider, first of all, the character of the defendants' conduct, what it was, what happened. You should consider the nature and extent

"It is well settled law in Pennsylvania that the decision of *whether to award punitive damages* and the *amount* to be awarded *are within the discretion of the fact finder." Delahanty* v. *First Pennsylvania Bank,*

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of harm to the plaintiffs. That is, consider what you believe under the evidence was the consequence of this.

You can consider the wealth of the defendant.

You can consider any other factor that you believe assists you in determining whether or not punitive damages should be awarded as either punishment and/or as a deterrence to like conduct of others in the future.

In regard to punitive damages, you should consider each defendant separately. First you decide if punitive damages should be awarded at all, and then to what extent, under the standard I mentioned."

When the jury requested further instructions on punitive damages, Judge Bechtle instructed again at length [App. 3759-62] when court reconvened the next trial day. He instructed in part: "[T]he first notion to keep in mind is that punitive damages are *different* from compensatory damages . . . Punitive damages may be awarded by a jury when the act or conduct is done with *reckless indifference or bad intent or motive*. But keep in mind, *the mere fact that someone has committed fraud doesn't automatically mean they are entitled to punitive damages*. You first have to decide if what happened here is what has been referred to by ***both counsel***, who suggested to the jury, and the cases support it, as well, whether the conduct was ***outrageous — outrageous***. *It could be fraudulent and not be outrageous*, but it could be fraudulent *and in addition* be outrageous . . . You should determine whether the evidence has been offered to you that ***the conduct was willful, malicious, wanton, reckless, or oppressive***. . . [Y]ou should consider the character of the conduct and the defendants who acted in that way . . . the nature and extent of the harm to the . . . plaintiffs . . . what resulted from this; the wealth of the defendant insofar as it is relevant in fixing an amount which will punish the defendant and deter the defendant or others from like conduct in the future . . .

The award of punitive damages must come from a reasoned, fair assessment of those factors, free of bias or prejudice or passion.

So, punitive damages, unlike compensatory damages . . . is to set a sum that the jury believes may be appropriate under the circumstances in a particular case in order to punish a defendant's *outrageous conduct* and to deter the defendant and others from the commission of like acts or conduct". [Emphasis added.]

N. A., 318 Pa. Super. 90, 129, 464 A. 2d 1243, 1263 (1983). Pennsylvania has adopted the rule for punitive damages set forth in §908 of Restatement (Second) of Torts and the comments thereunder. *Ibid.* Section 908 provides in part that "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's *evil motive* or his *reckless indifference to the rights of others.*" The law in Pennsylvania is that punitive damages need *not* be reasonably related to compensatory damages, and there is no requirement of proportionality. *Kirkbride* v. *Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A. 2d 800, 802-3 (1989). Where liability is determined in a cause of action, it is not necessary for specific compensatory damages to be awarded to sustain a punitive damage award. Punitive damages can be predicated upon the finding of liability. *Ibid.* Therefore, even if the Third Circuit's decision to grant a new trial on compensatory damages is sustained, the jury's award of punitive damages must stand.

The jury was certainly justified in concluding that Ford and Ford Credit, through their employees and/or agents, acted with "evil motive" or with "reckless indifference" to plaintiffs' rights when they defrauded plaintiffs. The jury properly found this to be "outrageous conduct" on the part of the defendants.[9]

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9. "Outrageous conduct," "evil motive" and "reckless indifference" are concepts that a jury could understand and determine as well as an appellate court. As this Court stated in *Pacific Mutual Life Insurance Company v. Haslip*, 111 S. Ct. 1032, 1044 (1991), the discretion given to a jury there in determining punitive damages was "no greater than that pursued in many familiar areas of the law as, for example, deciding 'the best interests of the child,' or 'reasonable care,' or 'due diligence,' or appropriate compensation for pain and suffering or mental anguish."

In erroneously concluding that "the evidence in this case clearly did not meet that level of outrageous or malicious conduct required to sustain an award of punitive damages" [Opinion, A-61], the Third Circuit first hauls up the red herring of a discussion Fraher and other Ford employees had in August 1981 long after Ford terminated Tunis Brothers' tractor franchise in April 1981 by

III. In conflict with *Brown Shoe Co.*, the Third Circuit improperly reversed the District Court and directed judgment n.o.v. on the verdict for petitioners' antitrust claims, disagreeing with the jury's finding that respondents' conspiracy substantially harmed competition in relevant, well-defined product and geographic "*submarkets*" in violation of antitrust laws.

By reversing and directing the District Court "to grant judgment n.o.v. in favor of all the defendants on the antitrust claims" (A-30; pages 7-8 *supra*), the Third Circuit not only erred in substituting its judgment for the jury's findings of fact on the relevant product and

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"accepting" the unconditional resignation of Tunis Brothers so fraudulently and unconscionably secured by Nickel and Fraher in March 1981. How could the Third Circuit think that this discussion would excuse Ford's "outrageous conduct" six months earlier?

And it was sheer sophistry for the Third Circuit to state at A-62 that Ford's fraudulent misrepresentation did not "constitute the requisite outrageous conduct for punitive damages" simply because Ford could have terminated Tunis Brothers' franchise upon 60 days notice ("which would not have constituted outrageous conduct") but instead "chose to fraudulently induce Tunis' resignation". By analogy, when a man can legally divorce his wife but elects instead to murder her, this is not "outrageous conduct".

The Panel claimed in note 13 of its Opinion (A-58) that it was troubled by certain remarks of petitioners' counsel during his rebuttal argument on damages. The very experienced trial judge was not troubled by what the Panel quoted out of context and which followed the highly inflamatory closing argument of respondents' counsel who accused petitioners (*i.e.*, their counsel) of putting their expert on the witness stand "in a calculated effort to deceive you, to bamboozle you . . . to change sworn testimony" and "to manipulate . . . you" (App. 4913-14; 3707-8). In his rebuttal, petitioners' counsel was only asking for punitive (not compensatory) damages, a way to punish Ford, not to "compensate" petitioners. He concluded: "Make those punitive damages very, very large. Make Ford . . . hurt. Give us as much as you possibly can [in] compensatory damages, but in the matter of fraud, you can make it hurt" (App. 3717). If any curative instruction was necessary, Judge Bechtle's very clear instructions on punitive damages, which the jury heard twice on different days, took care of that. In any event, counsel's rebuttal cannot justify the Panel's order on punitive damages.

geographic markets, but its decision was in conflict with *Brown Shoe Co., Inc. v. United States,* 370 U.S. 294, 325, 336-337 (1962) which held that well-defined product and geographic *submarkets* may exist within a broad market. See also *Columbia Metal Culvert Company v. Kaiser Aluminum & Chemical Corporation,* 579 F.2d 20 (3d Cir. 1978), *cert. denied,* 439 U.S. 876 (1978). As the Panel stated (A-14): "The question of relevant market definition is a factual one and 'we . . . must affirm the jury's conclusion unless the record is devoid of evidence upon which the jury might reasonably base its conclusions.' " *Weiss v. York Hospital,* 745 F.2d 786, 825 (3d Cir. 1984). For the factual and legal reasons stated by the District Court in its excellent analysis of the relevant market (A-83 to A-87), the District Court should be affirmed and the Court of Appeals should be reversed on petitioners' antitrust claim.

CONCLUSION

For the special and important reasons stated herein, petitioners respectfully submit that the Court should grant this petition for a writ of certiorari so that the Court may consider the questions presented, correct the errors of the court below in the interest of justice, and help safeguard the constitutional guarantee of trial by jury against judicial erosion through interference with the proper function of the jury.

Respectfully submitted,

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Attorney and Counsel of Record for Petitioners

May 11, 1992

(2)

No. 91-1809

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,

Petitioners

v.

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and WENNER FORD TRACTOR, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Filed December 27, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1797 and 90-1816

TUNIS BROTHERS COMPANY, INC.; RICHARD N. DE LA RIGAUDIERE; and DAVID C. SMITH,

vs.

FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC.; JOHN S. WENNER; JOHN WATSON; DOUGLAS N. CRAWFORD; EUGENE W. FRAHER; E. S. HASEL; HUGH NICKEL; KENNETH E. HARRIS; C. W. WENZEL

FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, and WENNER FORD TRACTOR, INC.,

Appellants in No. 90-1797

TUNIS BROTHERS COMPANY, INC.; RICHARD N. DE LA RIGAUDIERE; and DAVID C. SMITH,

Appellants in No. 90-1816

vs.

FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC.; JOHN S. WENNER; JOHN WATSON; DOUGLAS N. CRAWFORD; EUGENE

W. FRAHER; E. S. HASEL; HUGH NICKEL;
KENNETH E. HARRIS; C. W. WENZEL

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 82-05557)

Argued
June 27, 1991
Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges.
(Filed December 27, 1991)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

In this appeal arising out of the termination of a franchised tractor dealership, we are presented with several issues stemming from the lengthy trial in which the plaintiff, Tunis Brothers Company, Inc., obtained a jury verdict for $227,605.50 in compensatory damages and $4 million in punitive damages against the defendants, Ford Motor Company, Ford Motor Credit and Wenner Ford Tractor, Inc.[1]

This lawsuit grew out of the sale of Tunis Brothers, a Ford tractor dealership and hardware business, from its original owner, Richard Tunis, to Richard de la Rigaudiere and David C. Smith, and Ford Motor Company's refusal to transfer the Ford franchise with that sale. At the root of its antitrust claim, Tunis Brothers claims that the three Ford defendants conspired to terminate its Ford tractor franchise in order to benefit a competitor Ford franchisee, defendant Wenner Ford. To evaluate the merits of the antitrust claim,

---

1. Prior to trial, the district court dismissed the individual defendants, who were employees of either Ford Motor Company or Ford Motor Credit Company and the jury returned a verdict in favor of the remaining individual defendant, John S. Wenner. Moreover, the district court granted judgment n.o.v. in favor of the defendants on their motions to dismiss the individual plaintiffs, Richard N. de la Rigaudiere and David C. Smith.

we must visit the "mushroom capitol of the world" and the site of Tunis Brothers – Kennett Square, Pennsylvania – and learn of the preferences of Tunis Brothers' mushroom farming customers. Particularly, we need to assess whether the evidence demonstrates that the farmers' avowed preferences for Ford tractors and a Kennett Square Ford dealership satisfy the plaintiff's burden of proof on the elements of relevant product and relevant geographic markets. Tunis Brothers' fraud claim, similarly, stems from alleged misrepresentations made by Ford Motor and Ford Credit to induce Tunis to resign as franchise holder prior to the consummation of the sale. Moreover, the propriety of seeking as damages lost gross profits, rather than lost net profits will be addressed, as well as the level of outrageous conduct required to sustain an award of punitive damages.

I.

Because the facts underlying this appeal are so important to its resolution and because the district court has so thoroughly described those facts in its post-verdict Memorandum and Order dated December 3, 1990, we shall adopt as our own a large portion of the statement of facts of that Memorandum. We will first provide background for this case, review its procedural history, and then, as we discuss in turn each legal issue, we will more fully set forth particularly relevant facts.

The following background consists of all undisputed facts and facts reasonably inferred from the jury's verdict, taken in the light most favorable to the plaintiffs, the verdict winners, as

set forth in the district court's Memorandum Opinion:

> Tunis Brothers Company, Inc. was founded by Richard N. Tunis and his brother Robert in 1934 as a tractor and farm supply business in Kennett Square, Pennsylvania, known colloquially as the "mushroom capital of the world." In 1959, Tunis Brothers became a Ford Motor Company franchised dealership selling Ford tractors, equipment and accessories, as well as non-Ford products. From May 1, 1974, until the resignation of Richard Tunis on March 17, 1981, the parties' relationship was governed by a "Dealer Sales and Services Agreement" (the "franchise agreement"). It is undisputed that this franchise agreement expressly required Ford's prior written consent to transfer of ownership of the Ford franchise and additionally permitted termination of the franchise at will on thirty (30) days written notice by Tunis Brothers or on sixty (60) days written notice by Ford.
>
> Richard N. de la Rigaudiere was the nephew of Richard and Isabelle Tunis. He had worked at Tunis Brothers since 1966, eventually becoming the store's parts manager. David C. Smith was the owner of a local company named Fert-L Soil and a steady customer and friend of Richard Tunis. In March 1980, de la Rigaudiere and Smith approached Richard Tunis about the prospect of purchasing Tunis Brothers. The negotiations culminated in the sale of Tunis Brothers to de la Rigaudiere and Smith [on March 16, 1981] for the price of $450,000.00.
>
> Wenner Ford is a Delaware corporation with its principal place of business in Concordville,

> Pennsylvania — about eleven miles east of Kennett Square. Wenner Ford was the authorized Ford dealer of farm and industrial tractors nearest to Tunis Brothers. It was established as a privately owned dealership by John Wenner, a former Parts Operations Manager for Ford in Michigan, in 1977. As a result of a serious cash-flow problem, John Wenner recapitalized Wenner Ford as a Ford Dealer Development dealership in July, 1979 with the assistance of Ford employees Eugene Fraher, John Watson and Hugh Nickel, and Ford Motor credit employee Howard W. Stoneback. Under the terms of this program, Ford purchased 79% of the equity of Wenner Ford and owned all of its voting stock. John Wenner retained 21% of the equity and operated Wenner Ford as its President and Chief Executive Officer. Wenner was to buy out Ford's interest incrementally and eventually return to private dealer status.

District Court Memorandum Opinion Typescript at 6-8.

We will detail later the miscommunications characterizing the plaintiffs' negotiations with Ford, but a framework sketch is necessary here to provide a factual context for the legal claims. The plaintiffs first negotiated in April of 1980, with John Watson, Zone Manager for Ford's Tractor Operations, for the franchise held by Tunis in Kennett Square. Watson recommended to de la Rigaudiere and Smith that they relocate Tunis Brothers to the Oxford/Cochranville area approximately 10 miles west of Kennett Square. Watson subsequently issued a report in which he

recommended that de la Rigaudiere and Smith were qualified for a franchise in the Cochranville area.

Displeased with Watson's suggestion, de la Rigaudiere and Smith subsequently met with Eugene Fraher, the Northeastern District Manager of Ford Tractor Operations, in Cohoes, New York in June of 1980. Fraher informed them of Ford's designation of the Kennett Square location as an attrition point, and Ford's plan to establish a franchise in the Cochranville area. As an accommodation to the plaintiffs, however, Fraher promised to consider their application for a Kennett Square franchise for a 2-3 year period of time if they submitted a business plan to him, which they subsequently sent to Fraher. Fraher cautioned them, however, that any purchase of the Tunis Brothers Company should be made contingent upon obtaining the Ford franchise. Nevertheless, after they obtained mortgage financing, Smith and de la Rigaudiere failed to so condition their purchase of Tunis Brothers.

On March 3, 1981, Hugh Nickel, dealer replacement representative for the Northern Region of Ford Tractor Operations, and Douglas Crawford, who had succeeded John Watson as the Zone Manager, met with Smith, de la Rigaudiere, and the Tunises at Tunis Brothers. At that meeting Nickel requested that Richard Tunis, as franchise holder, submit an unconditional letter of resignation. The parties dispute whether Nickel represented that this resignation letter would be acted upon with Smith and de la Rigaudiere's franchise application or only after approval of their application. Nickel also took information from Smith and de la Rigaudiere necessary to complete

a franchise agreement. The plaintiffs maintain that they informed Nickel of their combined $50,000 investment in the business, however, the application reflected only a $5,000 investment. It is undisputed that Nickel recommended disapproval of the franchise application. The district court's Memorandum Opinion continues:

> The closing of the sale of Tunis Brothers took place on March 16, 1981, thirteen days after the meeting with Nickel. On March 17th, Richard Tunis sent his letter of resignation and termination notice to Ford, which were forwarded on March 23rd, by Nickel and Fraher, to Market Representation Manager Kenneth E. Harris for *immediate* action. Harris, however, held the letter pending the processing of plaintiffs' dealership and credit applications.
>
> * * * *
>
> On April 1, 1981, [Howard] Stoneback [, manager of the Philadelphia branch, of Ford Credit,] telephoned Harris to say that Ford Credit would not approve plaintiffs' credit application. On April 2, Richard Tunis was informed by a letter signed by John J.L. Johnson, General Sales Manager of Ford Tractor Operations, that his resignation had been accepted effective immediately. When plaintiffs were informed of this decision, they discovered the erroneous information in their credit application prepared by Nickel. Plaintiffs were subsequently permitted to submit a second credit application containing the correct information. However, before a decision on the revised credit application was reached, plaintiffs' dealership application was rejected. This

> information was conveyed to plaintiffs by letter dated August 7, 1981 from E. S. Hasel, the Regional Manager for the Northern Region of Ford Tractor who, like Fraher, was a director and senior vice-president of Wenner Ford. Tunis Brothers subsequently became a franchised dealer of Allis-Chalmers farm tractors but is currently in Chapter 11 bankruptcy.

District Court Memorandum Opinion Typescript at 11-12.

This litigation commenced on December 15, 1982, when Tunis Brothers, de la Rigaudiere and Smith filed their complaint naming as defendants Ford Motor, Ford Credit, Wenner Ford, John S. Wenner and Ford employees John Watson, Douglas N. Crawford, Eugene W. Fraher, E. S. Hasel, Hugh Nickel, Kenneth E. Harris, and C. W. Wenzel. The plaintiffs charged the defendants with a conspiracy to violate several provisions of the antitrust laws, including section 1 of the Sherman Act, 15 U.S.C. § 1; sections 7 and 14 of the Clayton Act, 15 U.S.C. §§ 18 and 25; and with various state law tort and breach of contract claims arising out of Ford's failure to renew the Tunis Brothers Ford tractor franchise upon its sale from Richard and Isabelle Tunis to de la Rigaudiere and Smith. And so began the long and tortuous legal proceedings that again find themselves before our court.

During the first round of litigation, in a June 22, 1983 order, the district court dismissed the claims asserted under the Clayton Act for failure to state a claim and the claim against C. W. Wenzel for lack of personal jurisdiction. *Tunis Bros. Co. v. Ford Motor Co.*, No. 82-5557 (E.D. Pa.

June 22, 1983). Later, the district court granted summary judgment in favor of all of the defendants on the remaining federal counts, finding that there were no genuine issues of material fact from which a reasonable jury could infer an antitrust conspiracy. *Tunis Bros. Co. v. Ford Motor Co.*, 587 F. Supp. 267 (E.D. Pa. 1984).

On appeal, we reversed that award of summary judgment, stating that "[v]iewing the evidence in the light most favorable to plaintiffs, we find that the evidence presented supports an inference that the close ties between . . . defendants Ford and Wenner Ford led to an illegal agreement, even if implicit." *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985) ("*Tunis I*").

On petition for writ of certiorari, the Supreme Court vacated our decision in *Tunis I* and remanded the case for reconsideration in light of its decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Court in *Matsushita* held that when an antitrust defendant's conduct is consistent with both permissible competition and illegal conspiracy, a plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently" in order to survive a motion for summary judgment. 475 U.S. at 588 (*quoting Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

On remand, we found that the "evidence adduced by [plaintiffs] to satisfy this burden [was] substantial but not overwhelming . . ." and further remanded the case to the district court for trial on all counts. *Tunis Bros. Co. Inc. v. Ford Motor Co.*, 823 F.2d 49, 51 (3d Cir. 1987) ("*Tunis II*"), *cert. denied*, 484 U.S. 1060 (1988). Pursuant to

this remand, the district court bifurcated the trial, commencing the liability portion on November 15, 1988.

After all of the liability evidence had been presented, on December 14, 1988, the district court granted the defendants' motion for a directed verdict on counts I, II, III and VI, and also their motion for the dismissal of de la Rigaudiere and Smith as individual plaintiffs.[2] Further, the district court dismissed all of the claims against the Ford employees in their individual capacities before submitting the case to the jury. Thus the only counts that remained were Counts IV and V against Ford Motor, Ford Credit, Wenner Ford, and John S. Wenner. Count IV charged the defendants with a violation of section 1 of the Sherman Act under the rule of reason doctrine. Count V alleged pendent state law claims of fraud, misrepresentation, and tortious interference with contractual relations.

Eight special interrogatories were sent to the jury to determine whether the remaining defendants had either conspired to violate section 1 of the Sherman Act under the rule of reason analysis or defrauded Tunis Brothers. In its answers to these interrogatories, the jury found that Ford Motor, Ford Credit and Wenner Ford had conspired to terminate the Tunis Brothers

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2. Count I alleged a per se violation of section 1 of the Sherman Act based on a horizontal conspiracy to allocate markets. Count II alleged that the franchise agreement between Tunis Brothers and Ford Motor was a contract in restraint of trade in violation of section 1 of the Sherman Act. Count III alleged the same conduct as count I denominated as "dirty business tricks." Count VI alleged that Ford Motor breached the franchise contract between the parties.

franchise, that the conspiracy had an adverse economic impact on the intrabrand market for Ford tractors in the Kennett Square area, and that the adverse impact on competition outweighed any beneficial competitive effects in that market. The jury also found that Ford Motor and Ford Credit had defrauded the plaintiffs in their attempt to secure a new Ford franchise. The jury exculpated John S. Wenner on all counts.

After denying the defendants' motion for a new trial on liability, the district court permitted the damages phase of the trial to commence. On February 1, 1989, the jury returned a verdict of $227,605.50 against Ford Motor, Ford Credit and Wenner Ford on the antitrust claim. In addition, the jury returned a verdict in the same amount against Ford Motor and Ford Credit on the fraud count. The jury apportioned damages for the fraud count in the amount of $159,323.85 against Ford Motor and $68,281.65 against Ford Credit. Finally, the jury awarded punitive damages against Ford Motor in the amount of $2,800,000.00 and against Ford Credit in the amount of $1,200,000.00.

In their February 17, 1989, motion for judgment notwithstanding the verdict or in the alternative for a new trial, the defendants alleged that the rulings of the district court were erroneous, that the jury's verdict was against the weight of the evidence, and that the plaintiffs' claims were insufficient as a matter of law. In the alternative, the defendants sought a new trial or a remittitur on damages. The district court denied these motions on September 26, 1990.

The parties have filed cross-appeals. Ford Motor and Wenner Ford challenge the denial of their motions for a judgment n.o.v. on both the antitrust

and fraud claims. They also challenge the denial of their motions for judgment n.o.v. or alternatively a new trial on both compensatory and punitive damages. Ford Credit, stipulated to be a wholly owned subsidiary of Ford Motor, additionally questions: (1) whether, as a matter of law, it can be capable of conspiring in violation of the Sherman Act with its parent corporation, Ford Motor; (2) the sufficiency of the evidence concerning the conspiracy between Ford Credit and Wenner Ford; and (3) Ford Credit's liability for fraud absent any evidence of misrepresentation by a Ford Credit representative.

Tunis Brothers, de la Rigaudiere, and Smith, in their cross-appeal, challenge the orders of the district court that: (1) excluded testimony of two expert witnesses on damages, (2) dismissed de la Rigaudiere and Smith as individual plaintiffs; and (3) denied prejudgment interest.

Our appellate jurisdiction is predicated upon 28 U.S.C. § 1291. We turn now to the issues.

II.

We begin with the challenges of all three Ford defendants to the district court's denial of their motions for judgment n.o.v. with respect to the antitrust verdict. Our review of a request for judgment n.o.v. is governed by the standard set forth in *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 921 (3d Cir. 1986), providing that we must determine whether the trial record is "critically deficient of that minimum quantum of evidence" required to allow the jury's verdict to stand. We are mindful that "[w]hen deciding a motion for judgment notwithstanding the verdict, the trial judge must determine whether the

evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict." *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989); *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253, 258 (3d Cir. 1986). "Our review of the application of this standard is plenary." *Bhaya*, 832 F.2d at 2559. The question of relevant market definition is a factual one and "we . . . must affirm the jury's conclusion unless the record is devoid of evidence upon which the jury might reasonably base its conclusion." *Weiss v. York Hospital*, 745 F.2d 786, 825 (3d Cir. 1984).

To recover under their Sherman Act section 1 claim, under the rule of reason test, the plaintiffs were required to prove: "(1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy." *Tunis I*, 763 F.2d 15 1489; *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). We will focus our analysis on the second factor to ascertain whether the evidence adduced at trial pertaining to the relevant product market, the relevant geographic market, and the anti-competitive effects supports the verdict. Because we conclude that the plaintiffs failed to prove these prerequisites, it will not be necessary for us to address the first, third and fourth requirements.

A. Relevant Product Market

The defendants contest the jury's finding, recorded in its interrogatory answers, that the relevant product market consisted solely of Ford tractors. According to the Ford defendants, even when viewed through the eyes of Tunis Brothers' predominant customers – mushroom growers – the relevant product market consists of Ford, Massey Ferguson, Case and John Deere tractors of comparable size, price and features.

The relevant product market is defined as those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1062-63 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978). Factors to be considered include price, use and qualities. *Du Pont de Nemours*, 351 U.S. at 404. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for the other like goods in that market. *Id.* at 380, 400. Here, the products that were under consideration by the jury were those which the local farmers – predominantly mushroom farmers – purchased for their agricultural needs.

It is clear that the Supreme Court has placed a heavy emphasis on interbrand competition in such cases as *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Continental T. V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Although the Supreme

Court has recognized that the reduction of intrabrand competition through the use of vertical restrictions might actually promote interbrand competition, *see GTE Sylvania, Inc.*, 433 U.S. at 52-54, nevertheless, the Supreme Court has reconfirmed that "[o]ur approach . . . is guided by the premises of *GTE Sylvania* and *Monsanto*: . . . that interbrand competition is the primary concern of the antitrust laws. . . ." *Business Electronics*, 485 U.S. at 726. The emphasis of antitrust theory is thus upon protecting interbrand competition.

Nonetheless, it is also true that a well-defined submarket may constitute a relevant product market and so under certain circumstances a relevant product market could consist of one brand of a product, placing intrabrand competition at issue. In *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), the Supreme Court, in addressing a merger in violation of section 7 of the Clayton Act, sought to determine the product market and stated:

> [W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe, 370 U.S. at 325 (citation and footnote omitted). Special characteristics of the relevant industry may influence market definition. *Columbia*

Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 28 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

Therefore, in considering the highly factual issue of whether there is a cross-elasticity of demand between Ford tractors and other tractors, we have examined prior cases in which relevant product markets have been defined. In *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377 (1956), the Supreme Court decided that the relevant market for cellophane was broader than cellophane only, and consisted of other interchangeable flexible packaging goods. The Court found that the cellophane market was not distinct from the market for flexible packaging materials and that at all times du Pont competed with the manufacturers of these other flexible packaging goods. Consequently, the relevant product market was not limited to cellophane alone, but encompassed other interchangeable flexible packaging goods.

More to the point, in *Mogul v. General Motors Corp.*, the district court concluded that a Cadillac automobile was not "so unique" as alone to constitute a relevant product market 391 F. Supp. 1305, 1313 (E.D. Pa. 1975), *aff'd without opinion*, 527 F.2d 645 (3d Cir. 1976). A Cadillac is "interchangeable with other luxury automobiles . . . [and] competes with even the less expensive models of automobiles in serving the consuming public's transportation needs and desires." *Id.* Therefore, the court granted summary judgment in favor of General Motors because although the plaintiff, who was seeking a Cadillac dealership, may have suffered an injury, there was no injury

to competition because other car dealerships were still available to potential consumers. *See also R.D. Imports Ryno Indus., Inc. v. Mazda Distrib. (Gulf), Inc.*, 807 F.2d 1222, 1225 n.2 (5th Cir.) (Mazda does not constitute relevant market as Mazdas have "a variety of domestic and foreign substitutes"), *cert. denied*, 484 U.S. 818 (1987); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir. 1981) (in a tying case, the relevant product market "is the sum total of medium priced automobiles manufactured by Chrysler and all other automobile manufacturers and sold in the United States"); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.) (no exclusively Packard relevant product market), *cert. denied*, 355 U.S. 822 (1957); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263, 269 (D.D.C. 1976) (no exclusively Chrysler relevant product market), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977).

We find these cases to be instructive.[3] Clearly, the plaintiffs had the burden of proving that Ford

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3. Although *du Pont* and *Mogul* involved section 2 of the Sherman Act, we believe that the analyses employed in those cases in defining a relative product market are instructive in this section 1 case.

We are cognizant that in *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 27 n.11 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978), we intimated that "the inquiries into the scope of competition under § 1 and § 2 are not precisely the same." *See also Martin B. Glauser Dodge Co.*, 570 F.2d at 81-82 n.17 (declining to address whether the relevant product market, as defined in cases involving section 2 claims, would also apply to section 1 cases). On this record, however, the plaintiffs do not present a sufficiently close factual issue to demarcate a distinction between product

tractors constituted the entire relevant market and that other tractors available for sale were not "reasonably interchangeable." To this end, the plaintiffs presented evidence primarily through the testimony of Richard Tunis, Richard de la Rigaudiere, David Smith, several local mushroom farmers, and Jacob Dudkewitz, a tractor dealer from the nearby town of West Grove, Pennsylvania. By looking, as we must, at the facts in the light most favorable to the plaintiffs, we find that although the mushroom farmers voiced their preference for Ford tractors, their own testimony established strong interbrand competition. The mere incantation of a "Ford tractor only" relevant product market does not satisfy that minimum quantum of evidence necessary to uphold the jury's verdict.

Richard Tunis, one of the original owners of Tunis Brothers, testified at length about the attributes of the Ford tractor and the mushroom farmers' preference for Ford's light industrial tractors. Tunis stated that he originally sold Allis-Chalmers tractors, which were "wonderful," but that because the mushroom farmers "wanted . . . a low, compact tractor with a loader on it that could turn their compost, and Allis-Chalmers didn't make anything like that," Tunis sought a Ford franchise. A Ford dealership was not

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market definitions in section 1 and section 2 cases where there is simply no evidence of a Ford only tractor market. We are not confronted with a gray zone where "rival products might provide sufficient competition to foreclose a finding of monopolization, yet the degree of insularity of the initial product might allow a finding of illegal restraint of trade in regard to restrictions imposed within that initial market." *Columbia Metal*, 578 F.2d at 27 n.11.

available at that time, however, so he sold Massey Ferguson tractors which were "almost similar to the Ford which the mushroom growers did like but not as good as Ford." In describing the Ford tractor, Tunis said that "it was compact; it had a good loader on the front of it. It was much better than the Allis-Chalmers, which was a high, clumsy tractor built so that you could cultivate corn with it." On the other hand, Tunis admitted that "Ford wasn't the only manufacturer that sold a light or medium industrial tractor that a customer might find useful" and that Massey Ferguson and Allis-Chalmers produced tractors that were "in the same general category."

David Smith testified that he gained extensive knowledge concerning the tractor preference of mushroom farmers while he worked for Fert-L Soil, his soil company, as he travelled to mushroom farms in an effort to purchase their compost. Selling in a very limited geographical area, ranging chiefly between Kennett Square and Toughkenamon, Smith stated that most of the farmers he saw had Ford tractors. He estimated that among the 40 farms that he visited, he saw approximately 30 tractors, of which 25 were manufactured by Ford. By the same token, Smith admitted that "mushroom growers did buy tractors from other people, you know, manufacturers." When Tunis Brothers was denied a Ford dealership, Smith chose to seek an Allis-Chalmers dealership rather than one from Massey Ferguson or John Deere, both of which made light industrial tractors, because too many Massey Ferguson and John Deere dealerships were located near Tunis Brothers. Furthermore, Smith admitted that John Deere and Massey Ferguson were competitors of

Ford, and Case also sold tractors to mushroom growers. In their application for a Ford franchise, Smith and de la Rigaudiere listed dealers of three brands that they considered to be their competitors: Massey Ferguson, International Harvester, and White.

The majority of the testimony regarding the relevant product market was elicited from several local mushroom farmers. Joseph DiNorscia III testified that he had a good relationship with Tunis Brothers, but that among the five tractors he owned, four were Massey Fergusons and only one was a Ford, which he bought from Wenner Ford's predecessor. Moreover, he did not believe that he used Tunis Brothers to service his tractors.

Mushroom farmer Peter Alonzo testified that he had two Ford tractors (one of which was purchased in used condition from a neighboring farmer) and one Case tractor. Alonzo previously owned Massey Ferguson and Allis-Chalmers tractors. On cross-examination he confirmed that in 1983, he owned three Ford tractors, one Massey Ferguson, one Allis-Chalmers and one Kaboda.

Lawrence T. Parrish Jr. testified that he owned three Ford tractors, one Allis-Chalmers tractor and a Massey Ferguson, all of which were purchased after 1978. He also stated that his business relationship with Tunis Brothers was good. With respect to his Allis-Chalmers tractor, Parrish opined that "[i]t's not cut out for the mushroom industry. It's too big, too cumbersome, but it did do the job eventually."

Ernest P. Martelli took the stand and stated that he owned three Fords and one Case tractor. Martelli admitted that he bought the Case after he

priced it against a comparable Ford and found the Case to be less expensive.

The last mushroom farmer to testify, Stephen P. Vincenti, owned two Fords and one Case tractor and stated that he purchased the Case after pricing it against comparable but more expensive Ford tractors. Describing the Case as a farm tractor, Vincenti nevertheless pointed out that "it is still [used as] . . . a function of the mushroom business."

Jacob Dudkewitz, the owner of the farm equipment dealership "S. G. Lewis and Son," also provided testimony regarding the relevant product market. Dudkewitz, a Massey Ferguson dealer, stated that his company sold to mushroom, dairy and grain farmers and had 85 to 90 percent of the mushroom growers market. Moreover, according to a survey made by his company in 1972, it had sold approximately 2,200 Massey Ferguson tractors to mushroom farmers. Dudkewitz also considered his major competition in the mushroom industry to be Case and in the agricultural industry to be John Deere. Finally, he asserted that the owners of large mushroom farms were shifting away from using smaller, more maneuverable tractors to purchasing large tractors made by Caterpillar, Michigan, Huff, John Deere and Case.

Clearly the evidence adduced at trial does not support the jury's finding of an exclusively Ford tractor market even when viewing the evidence in the light most favorable to the plaintiffs. Assuming that mushroom farmers only wished to purchase low, compact tractors such as Ford produced and disregarding the testimony of the plaintiffs' own witness, Dudkewitz, concerning the mushroom

farmers' increasing use of large tractors, a plethora of testimony confirmed that Massey Ferguson, Case and John Deere produced tractors comparable to Ford that competed against Ford tractors in the mushroom farmer market. Each of the mushroom farmers who testified for the plaintiffs admitted that they owned tractors other than Ford.

Furthermore, the evidence did not support the jury's finding of a Ford tractor only product market; rather, the evidence demonstrated a cross-elasticity of demand between Ford tractors and comparable tractors. Both Martelli and Vincenti testified that they bought comparable Case tractors because these cost less than Ford tractors. Smith and de la Rigaudiere also recognized this cross-elasticity of demand when they listed competitor non-Ford tractor dealers on their franchise application.

At best, the evidence suggests that mushroom farmers *preferred* the Ford tractor. Nonetheless, these same farmers did not buy Ford tractors exclusively and demonstrated sensitivity to price. Because the testimony does not indicate that the relevant product market was limited only to Ford tractors, we conclude that the relevant product market consisted of Ford and other comparable tractors.

B. Relevant Geographic Market

The plaintiffs asserted, and the jury so found, that the relevant geographic market comprised only the Kennett Square area, an oddly configurated area stretching 6.36 miles east, 7 miles west, 11.45 miles north and 10 miles south of the Tunis Brothers location. Not surprisingly,

the record indicates that Tunis Brothers was the only tractor dealership within this area.

As with the relevant product market, the plaintiffs bore the evidentiary burden of proving the relevant geographic market. *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). "The relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks[.]" *Id.* (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 331-32 (1961) (defining the relevant geographic area as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies" or as the area in which suppliers "effectively compete"). Consequently, the geographic market is not comprised of the region in which the seller attempts to sell its product, but rather it is comprised of the area where his customers would look to buy such a product. Further, the size of the relevant geographic market will differ depending upon the price, durability and size of the product; in practical terms, one would comparison shop in a larger geographic market for a tractor, as compared to a grocery item.

The plaintiffs' exhibit, depicting the Kennett Square Area, identifies concentrations both of mushroom farmers' workplaces and Tunis Brothers' customers' residences. These customers testified, however, that they did not limit themselves to such a restricted geographic region either when purchasing tractors or seeking service. In point of fact, each one of these mushroom farmers had purchased at least one tractor from

outside the suggested Kennett Square geographical area. Once again, even viewing the evidence in the light most favorable to the plaintiffs, we conclude that the relevant geographical market is clearly broader than the Kennett Square area.

Mushroom farmer Alonzo stated, with respect to the convenience of Tunis Brothers, that "being close always helps because it takes less time out of your workday to get your repairs and pick up your material." Nevertheless, he admitted that he also purchased parts at and had his previous Massey Ferguson tractor serviced by, S. G. Lewis in West Grove, which is outside the plaintiffs' Kennett Square area. Moreover, despite the fact that Alonzo testified that the location of Tunis Brothers and its proximity were beneficial, he had also purchased a Case tractor from a dealer in Delaware. Alonzo further noted that there were a number of mushroom growers from southern Chester County who had been omitted from the narrowly circumscribed area described by the plaintiffs as the Kennett Square area. Finally, Alonzo stated that if Tunis Brothers were located in Cochranville, which also is outside the Kennett Square area, he would still have gone there to buy parts, equipment, tractors and service.

Farmer Ernest Martelli testified that he had purchased one tractor in Rising Sun, Maryland, another in Quarryville, Pennsylvania, which is outside of Lancaster County, and had dealt with Wenner Ford in Concordville. Farmer Stephen Vincenti testified that he had purchased a tractor from A. L. Herr in Lancaster and had done business with Wenner Ford. Another farmer, Lawrence Parrish, after prodding on cross-examination, admitted that he might go to

Cochranville to buy from Tunis Brothers if it were to move there, especially given his long-standing relationship with Tunis Brothers and the fact that his farm was equally distant from Wenner Ford and Cochranville.

Massey Ferguson dealer Jacob Dudkewitz testified that the geographic area in which he sought customers consisted of a 25 mile radius stemming from his place of business in West Grove, Pennsylvania, that included the Kennett Square Area. He sought and transacted business in such diverse areas as "Cecil County, Maryland, New Castle County, Delaware, on and around the Philadelphia area, Coatesville, Downington and to the Lancaster County line and back to the Cecil County line in Maryland." Clearly, Dudkewitz, a competitor of Tunis Brothers, considered his actual and potential customers to be located in a much larger geographic area.

Moreover, Smith's and de la Rigaudiere's own actions indicated that they were not planning to confine their geographic market. In their Ford Franchise application, they listed three dealers, which they considered to be their competitors, that were located within a 20 mile radius of Tunis Brothers. Like Dudkewitz, the plaintiffs explained that they intended to pursue sales beyond the rigid confines of the "Kennett Square area" as delineated on their trial exhibit. They had contacted the Ford dealer in Rising Sun, Maryland, whose outstanding letter of intent to resign his dealership awaited only retirement and another Ford franchise's takeover of his territory, to reach an informal agreement that Tunis Brothers would cultivate sales in that territory pending his retirement. Moreover, Smith testified at some length that

Fert-L Soil salesmen would be commissioned to sell Fords for Tunis Brothers, and one of those salesmen, Martin Futyma, testified that he would have sold for Tunis Brothers in his New Jersey territory.

Thus plaintiffs' evidence did not establish that the relevant geographic market was limited to the Kennett Square area. Rather than eliciting testimony to indicate that customers, when seeking services or purchasing tractors, limited themselves to the Kennett Square area, the plaintiffs' witnesses were merely asked, when shown the outlined area on a map, "Is this what you would call the Kennett Square area?" By agreeing only that the circumscribed area constituted the Kennett Square area, the witnesses did not confirm that that area constituted the relevant geographic area in which those customers sought to buy or obtain service for tractors but merely indicated that the outlined area was what they would "call" the Kennett Square area. In fact, farmer Stephen Vincenti, on cross-examination, admitted that the Kennett Square area, as outlined by the plaintiffs, was "generally the Kennett Square area, not necessarily where it pertains to mushroom growers." The mere delineation of a geographical area, without reference to a market as perceived by consumers and suppliers, fails to meet the legal standard necessary for the relevant geographic market.

C. Injury to Competition

Having determined that the appropriate product market consists of Ford tractors and all comparable tractors that compete with Ford, and that the geographic market is greater than the

limited Kennett Square area as defined by the plaintiffs, we conclude that the plaintiffs have failed to show that Ford Motor exercised market power. Therefore, they have also failed to show that Ford Motor caused an unreasonable restraint of trade that implicated an injury to competition. It is axiomatic that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)(emphasis in original)). As we stated in *Sitkin Smelting and Ref. Co. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978),

> In applying the rule of reason standard, courts are called upon to judge shades and gradations of competitive impact. The standard for determining what combinations involve the prohibited degree of harm is nowhere spelled out in specific terms. It is clear, however, that plaintiffs have a burden to show more than a de minimus restraint.

The Sherman Act was designed to prohibit significant restraint of trade rather than to "proscribe all unseemly business practices;" *id.* at 448; *see Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940); and the plaintiffs must have demonstrated some harm to the competitive landscape from Ford Motor's termination of the Tunis Brothers franchise. Cf. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 892 (3d Cir.) (nothing in "nature or character of the alleged conduct or its surrounding circumstances to support an inference that it was intended or likely

to restrain trade or enhance prices"), *cert. denied*, 454 U.S. 893 (1981). An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality "of goods or services."

Although the plaintiffs did elicit some minimal testimony indicating that the prices for Ford products at Wenner Ford were high in comparison to the other products such as Case tractors, they never demonstrated that Wenner Ford's prices rose after Tunis Brothers was denied its Ford franchise. In addition, there was some evidence that the service and credit terms offered by Wenner Ford to mushroom farmers were less desirable than those offered by Tunis Brothers. Nevertheless, this testimony amounted to no more than some customer dissatisfaction with the loss of "friendliness" that customers of Tunis Brothers had appreciated and did not demonstrate, nor does it support a jury inference of, any discernible injury to competition.

Furthermore, since the primary goal of antitrust law is to protect interbrand competition, the evidence from certain mushroom farmers that they were able to purchase comparable, different brands of tractors at lower prices indicates that neither the availability of other brands nor the price of products was affected negatively. Additionally, because these same witnesses testified that other brands they purchased were comparable, neither was quality affected. On this evidence, we conclude that the plaintiffs failed to prove that the termination of Tunis Brothers' Ford franchise constituted an antitrust violation because mushroom farmers were still able to purchase comparable tractors at competitive

prices. Therefore we will reverse and remand this appeal for the district court to grant judgment n.o.v. in favor of all of the defendants on the antitrust claim.

Because we ground our reversal of the antitrust claim upon the plaintiffs' failure to demonstrate adequately any injury to competition, we need not reach the additional antitrust issues raised by Ford Credit. We leave to another day a resolution of the legal question posed by Ford Credit and Wenner Ford — whether a wholly- or majority-owned subsidiary and its parent corporation can conspire in violation of the Sherman Act.[4] In addition, Ford Motor's assertion that the district court erred in declining to give a *Matsushita* charge to the jury on the antitrust claim is likewise mooted. *See Matsushita Elec.*

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4. However, inconsistent with *Tunis I*, in which we indicated that the plaintiffs had not pursued their claim that Ford Motor and its wholly-owned subsidiary Ford Credit had conspired in violation of the antitrust law, 763 F.2d at 1495 & n.20, the plaintiffs did pursue this theory at trial. The plaintiffs even stipulated that Ford Credit is a wholly-owned subsidiary of Ford Motor. We need not here apply *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), which held that a parent and its wholly-owned subsidiary were "incapable of conspiring with each other for the purposes of § 1 of the Sherman Act," to determine whether either Ford Credit or Wenner Ford could have been capable of conspiring with Ford Motor. Because the relationship between Wenner Ford and Ford Motor differs, for Sherman Act conspiracy purposes, from the *Copperweld* or Ford Motor/Ford Credit relationship, we decline to consider where, as here, the plaintiffs were unable to establish antitrust liability.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).[5]

III.

A.

We turn now to the jury's determination that Ford Motor and Ford Credit induced the plaintiffs to act through fraudulent misrepresentations. We are asked to consider whether a judgment n.o.v. should have been granted in favor of the defendants. In looking at all of the evidence relating to the alleged fraud in the light most favorable to the plaintiffs, we once again adopt the narrative of the district court as our own.

> [At the commencement of] their negotiations for the purchase of Tunis Brothers, de la Rigaudiere and Smith contacted John Watson, Zone Manager for Ford's Tractor Operations in

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5. In *Matsushita*, the Court reversed a grant of summary judgment for the plaintiffs, reasoning that the evidence did not rule out the possibility that the allegedly conspiratorial conduct of the defendants was consistent with legitimate business interests. 475 U.S. 597-98. The Court thus held that the plaintiffs had failed to prove the lack of a genuine issue of material fact to prevail on the motion for summary judgment.

Relying upon *Matsushita*, the Ford defendants requested that the district court instruct the jury that in order for Tunis Brothers to prevail, the jury must find that they had a motive to conspire in violation of the antitrust laws and that they acted inconsistently with their economic interests. The district court gave to the jury a standard antitrust conspiracy charge and denied the Ford defendants' motion "[t]o the extent [the standard instructions] fail to incorporate the defendants' requested instruction on motive." District Court Memorandum Opinion Typescript at 14 n.3.

the area including Kennett Square and Concordville. At the suggestion of Watson, de la Rigaudiere and Smith met Watson at Wenner Ford on May 23, 1980. They were introduced to John Wenner and given a tour of his facility. Watson, de la Rigaudiere and Smith proceeded to lunch at the Concordville Inn where Watson informed them that Ford did not wish to renew the Tunis Brothers dealership in Kennett Square after its sale or the retirement of Richard Tunis and that the Kennett Square market was slated for Wenner Ford. Watson recommended that plaintiffs consider opening a dealership in Oxford, or Cochranville, Pennsylvania, located about fifteen miles west of Kennett Square. The record shows that John Wenner was sitting at a nearby table during this discussion. Watson subsequently wrote in his Ford New Dealer Prospecting Report that plaintiffs were qualified to operate a Ford franchise in the Oxford/Cochranville area.

Skeptical of Watson's motives regarding Wenner Ford, plaintiffs contacted his superior Eugene Fraher, the Northeastern District Manager of Ford Tractor Operations. Plaintiffs met with Fraher and his assistant Edward Poole, on June 13, 1980 in Fraher's office in Cohoes, New York. Fraher confirmed that the Kennett Square dealership was an attrition point but told plaintiffs they could possibly remain in Kennett Square for two to three years, after which time they would be required to move to Cochranville. Fraher gave them dealer applications and told them to submit a business plan to him. He also warned them that any purchase of Tunis

Brothers should be made contingent upon Ford's approval of their business plan. What Fraher did not disclose was that his duties at Ford included oversight of Ford Dealer Development companies in his territory and that he was then a Director and Senior Vice-President of Wenner Ford.

Plaintiffs obtained mortgage financing for the purchase of Tunis Brothers through the Chester County Industrial Development Authority and on December 16, 1980 signed an Agreement of Sale with Richard and Isabelle Tunis. It is undisputed that this agreement did not take into account Fraher's admonition making the sale contingent on Ford's approval of the franchise. In January 1981, plaintiffs sent these materials, along with their business plan and dealer applications, to Fraher and Douglas Crawford, who had succeeded Watson as Ford's Zone Manager.

On March 3, 1981, Crawford and Hugh Nickel, Dealer Replacement Representative for the Northern Region of Ford Tractor Operations, met with de la Rigaudiere, Smith and Richard and Isabelle Tunis at Tunis Brothers. Plaintiffs testified that Crawford stated they were sent by Fraher. Nickel explained that Ford would not process an application for a replacement dealer unless the present dealer submitted a letter of resignation. Nickel presented Richard Tunis with a form letter of unconditional resignation and a termination notice for Richard Tunis to send to Ford. Nickel told them, in a representation which forms the core of plaintiffs' claim of fraud, that the resignation letter would not be processed until the new dealership application

was approved but, instead, would be "held in a drawer." Nickel also recorded plaintiffs' financial information and had de la Rigaudiere and Smith sign blank credit applications which he claimed would be typed up at his office and returned to plaintiffs for their review.

Plaintiffs were not sent copies of this first completed application which misstated plaintiffs' investment in Tunis Brothers. Smith and de la Rigaudiere were to invest $25,000.00 each in the dealership for a total investment of $50,000.00. The credit application prepared by Nickel reflected only a $5,000.00 investment in the business. Plaintiffs further testified that no mention of the move to Cochranville was made at this meeting. Despite his assurances that plaintiffs would be approved, Nickel's New Dealer Prospecting Report stated that de la Rigaudiere and Smith were not qualified businessmen and did not have adequate financing to be approved for credit.

The closing of the sale of Tunis Brothers took place on March 16, 1981, thirteen days after the meeting with Nickel. On March 17 Richard Tunis sent his letter of resignation and termination notice to Ford, which were forwarded on March 23 by Nickel and Fraher to Market Representation Manager Kenneth E. Harris for *immediate* action. Harris, however, held the letter pending the processing of plaintiffs' dealership and credit applications.

After receiving Nickel's letter of March 23rd and the plaintiffs' application, Stoneback of Ford Credit telephoned Nickel in the presence of his

Assistant Branch Manager Harry Saxton. Saxton prepared a chronology of subsequent events. Under an entry dated "4/81," Saxton wrote:

> Branch received the file from T&I [Tractor and Implementations] on subject dealer [Tunis Brothers]. It reflected the replacement Principals and $5,000.00 total investment on Pro-Forma and also reflected $400M Mortgage loan, $168M negative net worth. Branch discussed prospective dealer file with Hugh Nichol [sic] of T&I *who confirmed a small $5,000.00 investment.* He also stated that T&I was not confident the two principals could sell enough equipment to generate profits to repay the $400M note. *He also implied that T&I did not want the deal approved.* He also stated that the transfer of the dealership ownership without T&I approval was reason for the franchise to be terminated.

(Emphasis added.) Although Stoneback did not recall this conversation and Nickel, in deposition, expressly denied confirming the inaccurate $5,000.00 investment, the jury obviously believed Saxton's chronology and supporting testimony.

District Court Memorandum Opinion Typescript at 8-12.

In addition to this evidence, there was testimony by Jacob Dudkewitz, the Massey Ferguson dealer in West Grove, which, if credited by the jury, supported the plaintiffs' theory that the taking of their application for a franchise served only as a ruse to obtain Richard Tunis's resignation. Dudkewitz testified that he negotiated with Watson and Crawford for a Ford tractor franchise as early as October 11, 1980, which was subsequent to the

Cohoes, New York, meeting between Fraher and the plaintiffs and prior to Nickel's acquisition of Tunis's resignation. Dudkewitz testified that at that meeting, in response to his query about Tunis Brothers, Watson explained that Tunis Brothers' franchise would soon terminate and not be renewed. During these negotiations, which continued until February or March of 1981, according to Dudkewitz, Ford assured Dudkewitz that he could carry any Ford product lines, including the large loader he specifically desired.

Moreover, at one point Dudkewitz inquired whether Wenner Ford was a "company store"[6] and Nickel, although involved in Wenner Ford's previous conversion to a dealer development franchise, unequivocally informed Dudkewitz that Wenner Ford was "independently privately owned." Dudkewitz explained that negotiations broke off just prior to a signing of the franchise agreement; Ford withdrew its promise to supply him with the large four-wheel drive unit he had been promised, because, according to Crawford, Wenner Ford carried that item.

From this evidence, the jury could certainly have chosen to disbelieve the exculpating testimony of

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6. Ford differentiates between a "company store," entirely owned and operated by Ford, and a dealer development franchise such as Wenner's into which Ford infuses capital to struggling dealerships in exchange for all the voting stock and a large majority of the equity ownership of the company. The avowed purpose of the dealer development program is to assist struggling dealerships temporarily and then to promote gradual repurchase of the equity by the franchise holder. For a general description of these arrangements, and certain antitrust consequences, *see Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

the defendants in favor of the testimony of the plaintiffs' witnesses. We cannot disturb the verdict insofar as it reflects a judgment on the credibility of the plaintiffs and the plaintiffs' version of events versus, for example, the versions given by Nickel, Crawford and Fraher.

B.

In order to prove a claim of fraudulent misrepresentation under Pennsylvania law, which all the parties agree governs, the plaintiffs were required to prove: (1) a misrepresentation; (2) a fraudulent utterance; (3) an intention by the maker that the recipient will be induced to act; (4) justifiable reliance on the misrepresentation; and (5) damage to the recipient as a proximate result. *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285, 285 A.2d 451, 454 (1971), *cert. denied*, 407 U.S. 920 (1972); *Smith v. Renaut*, 387 Pa. Super. 299, 306, 564 A.2d 188, 192 (1989); *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983).

Each element of the claim must be proven by clear and convincing evidence. *Scaife*, 446 Pa. at 285, 285 A.2d at 454. The Pennsylvania Superior Court in *Delahanty* elaborated on those actions which would constitute fraudulent behavior: "'fraud consists in anything calculated to deceive, whether by single act or combination, or by suppression of truth, or a suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture. It is any artifice by which a person is deceived to his disadvantage.'" *In re McClellan's Estate*, 365 Pa. 401, 407, 75 A.2d 595, 598 (1950) (quoting *In re Reichert's Estate*, 356 Pa. 269, 274,

51 A.2d 615, 617 (1947)); *Delahanty*, 318 Pa. Super. at 107, 464 A.2d at 1251 (citing *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412 (1981)). A fraud also occurs when one is induced to assent when he would not otherwise have done so. *Delahanty*, 318 Pa. Super. at 107, 464 A.2d at 1251-52. Fraudulent misrepresentation may be accomplished "by concealment of that which should have been disclosed, which deceives or is intended to deceive another to act upon it to his detriment." *Id.* at 108, 464 A.2d at 1252.

The Ford defendants argue that the plaintiffs failed to prove that a misrepresentation was made upon which the plaintiffs could have reasonably relied. To the contrary, examining the evidence in the light most favorable to the plaintiffs, we conclude that the trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor and Wenner Ford.

Richard Tunis, his wife Isabelle Tunis, Smith and de la Rigaudiere testified as to the events which gave rise to their claim of fraud. Each of these individuals essentially corroborated one another's testimony with respect to a meeting that transpired with two employees of Ford Motor. On March 3, 1981, de la Rigaudiere, Smith, and the Tunises met with Douglas Crawford and Hugh Nickel. According to their testimony, Nickel insisted that Richard Tunis would be required to submit an unconditional letter of resignation as soon as he consummated the sale of the business with Smith and de la Rigaudiere. Nickel then produced a proposed form letter which they were to prepare on Tunis Brothers' letterhead. He indicated that the completed letter should be sent

to him at Ford Motor immediately after the consummation of the sale of the business. According to the plaintiffs, Nickel then assured them that the unconditional letter of resignation would be "stuck in a drawer" and would not be acted upon until after de la Rigaudiere and Smith were approved as dealers. Additionally, according to the plaintiffs, Nickel assured them that their application would be approved.

Nickel also produced a blank application for credit, which he insisted that de la Rigaudiere and Smith sign, stating that rather than risk delay and the possibility of error in filling out the applications, Nickel preferred to gather the information and have his secretary type the form. This would ensure, he stated, an expedited approval process. Nonetheless, although Smith and de la Rigaudiere informed Nickel that their investment in the company would total $50,000, consisting of $25,000 apiece, Nickel recorded a total investment of only $5,000, or $2,500 apiece. According to the Saxton chronology, Nickel confirmed to Stoneback of Ford Credit a total of only $5,000. Because Nickel never sent a copy of the typed application to the plaintiffs for their review as he promised, Smith and de la Rigaudiere did not become aware of this understatement until after Ford Motor's denial of their initial credit application.

Toward the end of the meeting, Smith and de la Rigaudiere expressed their concern as to how they would be able to continue to order tractors and tractor parts. Nickel assured them that they could continue purchasing equipment under Richard Tunis's existing credit line since, as he had mentioned, the resignation letter would not be

acted upon until they were accepted. Nickel then welcomed them as dealers, but forwarded Richard Tunis's resignation letter for immediate action.

Further testimony in support of the plaintiffs' theory came from Harold Saxton, a Ford dealer regional manager. Contrary to the assertions by the defendants that the credit application was denied because of a poor credit rating, Saxton testified that Tunis Brothers had a favorable record and good debt ratio. Saxton's written chronology indicated that Nickel implied to Stoneback that he, Nickel, did not want the Tunis Brothers Ford franchise to survive Richard Tunis's retirement.

The Ford defendants counter that any loss sustained by the plaintiffs resulted from their decision, contrary to Fraher's explicit advice, not to condition the purchase of Tunis Brothers upon the acquisition of the Ford franchise. This failure, they posit, rather than any fraudulent misrepresentation on the part of the Ford defendants, accounts for the plaintiffs' misfortune because Ford Motor did not owe any obligation to the plaintiffs to grant Tunis Brothers a franchise. Instead, the Ford defendants assert, Ford Motor denied that franchise for sound business reasons, namely, that Tunis Brothers would be undercapitalized and heavily burdened by mortgage debt.

The jury credited the plaintiffs' equally highly plausible account that even though the unconditional sales agreement was reached in December of 1980, the closing did not occur until after the pivotal meeting with Nickel on March 3, 1981, when Smith and de la Rigaudiere believed that they would be approved by Ford Motor. Smith

testified that because this sale was a "family affair," both he and de la Rigaudiere could have reneged on the sales agreement had the franchise been disapproved. Further, had Ford Motor believed otherwise, its insistence upon an unconditional letter of resignation from Richard Tunis, rather than a "letter of intent" pending retirement, would not have made sense. The jury could have reasonably inferred from its conduct that Ford Motor recognized that because the sales agreement was a "family affair," and therefore not likely to be legally enforced until after the closing, Tunis's resignation would need to be obtained without disrupting the pending sale. That Ford Motor could terminate a franchise at any time upon a sixty day notice period does not negate this inference because Fraher testified that Ford customarily chooses not to terminate older long-term dealerships selected for attrition, but prefers instead to reward those dealers by deferring attrition until after the dealer's voluntary retirement.

Moreover, the testimony was sharply conflicting as to whether Tunis intended to retire in the event that the plaintiffs did not obtain the Ford franchise. A memorandum handwritten by Ed Poole of Ford Motor recorded his telephone conversation with Richard Tunis and de la Rigaudiere and reflected that Tunis intended to retire and de la Rigaudiere intended to buy Tunis Brothers regardless of the availability of the franchise. Tunis and de la Rigaudiere categorically denied conveying any such intentions, and Smith confirmed that he would not have sought to purchase Tunis Brothers without the Ford franchise, opining that Tunis Brothers' hardware

business alone would not suffice to support Smith's and de la Rigaudiere's families.

This evidence clearly supports the jury's determination that Ford Motor and Wenner Ford committed a fraud against the plaintiffs. Notwithstanding Ford Motor's assertion that it warned Smith and de la Rigaudiere not to go through with any deal unless it were conditioned upon their acceptance as a dealership, sufficient evidence was adduced at trial to create a jury question. Furthermore, although Ford Motor argues that a second dealer application was handled without incident, we do not agree that its effect was to moot the fraud which was found to taint the initial application for the reason that Ford Motor had already acquired Richard Tunis's resignation.

C.

A different result is required with respect to the fraud verdict against Ford Credit, because as a matter of law, the plaintiffs have not established that Ford Credit perpetrated a fraud on the plaintiffs. There is no evidence in the record to substantiate the plaintiffs' claim that Ford Credit made any misrepresentation. Neither Nickel nor Crawford, both employed solely by Ford Motor, represented themselves as Ford Credit employees or agents during the March 3rd meeting. Only Isabelle Tunis stated that she had thought Nickel was from Ford Credit, but she admitted that she later learned that he was an employee of Ford Motor Company.

Moreover, for purposes of apparent authority, there is no evidence that Ford Credit, as the principal, made any representations that Nickel, as

an alleged agent, had any authority to act on its behalf. *See, e.g., Edwards v. Born, Inc.*, 792 F.2d 387, 390 (3d Cir. 1986); *Amritt v. Paragon Homes, Inc.*, 474 F.2d 1251, 1252 (3d Cir. 1973); Restatement (Second) of Agency, §§ 8, 27; *see also Bolus v. United Penn Bank*, 363 Pa. Super. 247, 261, 525 A.2d 1215, 1222 (1987) (". . . in determining the apparent authority of an agent we must look to the actions of the principal, not the agent . . ."), *alloc. denied*, 518 Pa. 627, 541 A.2d 1138 (1988). De la Rigaudiere, himself, testified that Nickel was an employee at Ford Tractor. Accordingly, because there is no evidence to suggest that Ford Credit committed any fraud against the plaintiffs, we will reverse the judgment against Ford Credit on the fraud count, remanding this issue to the district court for judgment to be entered in favor of Ford Credit.

IV.

Ford argues that judgment n.o.v. or in the alternative for a new trial on damages should be granted because of errors in the jury's determination of compensatory damages. Since we have already concluded that the antitrust claim must fail for lack of proof, we shall limit our analysis to the damages arising from the fraud claim against Ford. In this regard, the defendants raise numerous contentions that are both substantive and related to alleged discovery abuses. We conclude that a new trial will be required on the issue of damages related to the fraud count. Thus, we will not address the merits of the discovery-related contentions; we trust that during any ensuing discovery, all documentation underlying the plaintiffs' proof of damages will be

timely and adequately produced, and that notice of the identity of all expert witnesses will be timely given.[7] We take up the remainder of the defendants' challenges seriatim. We review the district court's denial of the motion for judgment n.o.v. to determine whether there is sufficient evidence in the record to sustain the verdict on compensatory damages. *See National Controls Corp. v. National Semiconductor Corp.*, 833 F.2d 491, 495 (3d Cir. 1987).

We consider first whether there was sufficient evidence to support the jury's selection of a ten year period of time for damage calculation. Second, we will consider the scope of lost profits compensable for fraud, specifically whether the plaintiffs are entitled to recoup lost gross profits rather than net profits. Third, we examine whether the evidence was sufficient to support the plaintiffs' claim for compensatory damages.

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7. All three Ford defendants contend that the plaintiffs altered their compensatory damage claim midway through the damages portion of the trial when confronted with inaccuracies in the underlying data. Further, they claim that no documentation was provided to them for the revised damage claim. In addition, the Ford defendants challenge the notice, as late as mid-December of 1989, that Dr. Samuel J. Kursh would appear as an expert witness for the plaintiffs. Although successful in precluding Kursh's testimony at the damages trial because of this late notice and the cumulative nature of Kursh' testimony, Tunis Brothers has appealed that ruling. Should Tunis Brothers be able to satisfy the district court on remand that Kursh's testimony is not cumulative, and we express no opinion as to whether this will be possible, we are confident that the plaintiffs will provide adequate notice that Kursh will be testifying.

A.

To set the stage for the discussion that follows, we offer a brief explanation of the method used by the plaintiffs' expert, Morton Oxman, to calculate compensatory damages for both the antitrust and fraud claims. Oxman first calculated average gross profit percentages for both tractor and hardware sales for the last four years, from 1977 through 1980, that Richard Tunis managed Tunis Brothers. To that average, Oxman sought to compare de la Rigaudiere and Smith's performance during 1981 – the year Oxman determined would provide the most reliable base year. The choice of this base year required that the amount of gross sales and gross profit margin be projected because the Ford franchise was terminated in early April 1981, so that Tunis Brothers did not have Ford sales for the latter three-quarters of 1981.[8] Oxman premised the Ford tractor sales projections for 1981 upon actual hardware sales for 1981, providing as his only reason for doing so the youth and energy of the new management – a factor constant to both Ford and hardware sales. Because the hardware sales in 1981 amounted to a 51.3 percent increase over the average hardware sales from 1977-1980, Oxman's base year calculation for Ford tractors was also projected as a 51.3 percent increase. To that base year projection, Oxman added tapering yearly increases ranging from 40 percent to not less than 10 percent: the tapering percentage increases were to

8. Tunis Brothers did continue to buy Ford parts from other franchises during 1981; however, they made less profit on these items and it is not contended that these ought to be included in the 1981 projection as franchise related profits.

account for market saturation; the percentage figures were arrived at by extrapolating percentages solely from de la Rigaudiere and Smith's estimates of the number of Ford tractors they believed they could sell in each year spanning 1982 through 1991.

As an initial matter, the defendants' challenge to this ten year span of time merits discussion. Because it relates to the fraudulent misrepresentation by Ford Motor, we retrace some of that evidence here. Throughout the course of this litigation, the plaintiffs had taken the position that after the March 3, 1981, meeting with Crawford and Nickel, they believed they would be permitted to operate the Ford franchise in Kennett Square for an additional two to three years. This understanding was consistent with Ford Motor's Northeastern District Manager Eugene Fraher's statements at their meeting in Cohoes, New York, in June of 1980, that if they submitted an adequate business plan, he would consider their application for the Kennett Square location during an interim two to three year period before they relocated to the Oxford/Cochranville area.[9] In fact,

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9. The plaintiffs planned to open a Ford franchise in Cochranville but also planned to maintain the Tunis Brothers' Kennett Square location for service and hardware sales. They failed, however, to provide evidence of damages for the loss of a Cochranville franchise. In this connection, a November 16, 1981, letter from Fraher to Smith, which indicated that "[Ford has] no problem with you relocating to Cochranville . . . . When you locate a building please let us know so that we can look at it," combined with the plaintiffs' own testimony, suggests that they declined further to pursue a Ford franchise. Thus their expert, Oxman, lacked the requisite foundation to testify that even if the Kennett Square franchise was conditional upon moving to Cochranville in two to three years,

Smith testified during the damages portion of the trial that he understood Fraher's promise to be limited to two to three years.

De la Rigaudiere also testified during his deposition and at one point in the damages portion of the trial that he interpreted Nickel's omission of a Cochranville location as approval by Ford Motor of the business plan they had sent to Fraher pursuant to the June 1980 meeting. De la Rigaudiere altered his testimony in the midst of the damages trial, responding as follows to the district court's question, "Are you changing that answer now?": "Yes. And the reason is because I can remember how elated we were at the end of that meeting with Mr. Nickel, and I remember my aunt [Isabelle Tunis] and David [Smith] being very elated about it, because there was nothing mentioned about Cochranville or Oxford." Despite de la Rigaudiere's recall of Smith's "elation," there is no evidence that it was related to an *indefinite* franchise at the Kennett Square location other than de la Rigaudiere's sudden change of testimony. Even granting to the jury the benefit of all credibility determinations, the record does not sufficiently substantiate a ten year period of time. Thus, upon remand, the compensatory damages evidence must be limited to that two to three year period of time dating from the 1981 franchise termination.

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the termination of the franchise resulted in losses to the Kennett Square location regardless of costs associated with a Cochranville location.

B.

Next, we examine the issue of whether the proper measure of damages is net profits rather than gross profits. Our starting point is the case of *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243 (1983). In addressing the compensatory damages issue, the court in *Delahanty* observed that "[u]nder Pennsylvania law, in an action based on fraud, the measure of damages is 'actual loss,' . . . and not the benefit, or value, of that bargain." *Id.* at 117, 464 A.2d at 1257 (citing *Kaufman v. Mellon Nat'l Bank and Trust Co.*, 366 F.2d 326, 331 (3d Cir. 1966), which provided the Pennsylvania rule that in a fraud action, the plaintiff is entitled to recover his actual loss); *see also Baldissari v. Baldissari*, 278 Pa. Super. 312, 317, 420 A.2d 556, 559 (1980) (citing *Kaufman* for a statement of the rule requiring proof of lost net profits).

It does not follow, however, that the plaintiffs should have been permitted to introduce evidence pertaining only to lost *gross* profits. Rather, as we determined in *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1116 (3d Cir.), *cert. denied*, 414 U.S. 867 (1973), the appropriate measure of damages with respect to future lost profits is net profits, not gross. "Net profits" are defined as "gross revenue less fixed costs, and less variable costs pegged to the number of units sold." *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1351 (3d Cir. 1975). In *Deaktor* we stated that the "[p]laintiffs' failure to produce evidence concerning the factors essential to establish net profit as opposed to gross profit, in effect, meant that the jury would have had to speculate as to the amount of damages."

Tunis Brothers asserted that gross profits constituted a proper measure of damages because there would not have been any discernible increased cost in overhead expenses associated with the projected lost tractor sales. The only cost increases—which Oxman described as "negligible"—would have been truck operation costs and sales commissions to Fert-L Soil salesmen[10], these latter estimated at $8,800 per year or $88,000 over the ten year period. Any other additional overhead costs, according to Oxman, would have been negated by the rate of inflation. Tunis Brothers thus contended that Ford tractor sales did not appreciably increase its fixed overhead expenses; utilities and salaries would have remained the same regardless of additional tractor sales. Oxman differentiated between net profits reflected in Tunis Brothers' corporate tax returns and the true profit picture of the business. For example, during Richard and Isabelle Tunises' ownership, the corporate tax returns for Tunis

10. De la Rigaudiere and Smith had planned to increase Tunis Brothers Ford tractor sales in three different ways. First, de la Rigaudiere planned to pursue 50 percent of the Ford tractor sales at the Kennett Square location. Second, David Smith would have made 25 percent of their Ford tractor sales while visiting farms in connection with Fert-L Soil sales. For these sales, Smith would not receive a commission, nor would his salary from Tunis Brothers have been increased. The last 25 percent of Tunis Brothers Ford tractor sales would have been pursued by other Fert-L Soil salesman, who would have received a four percent commission on their Ford tractor sales, estimated to total approximately $8,800 per year. Other than these commissions, no additional costs were attributed to Tunis Brothers for the Fert-L Soil salesmen because Fert-L Soil, Smith's family owned and operated business, would have borne those costs.

Brothers showed very small net profits.[11] According to the plaintiffs, this small net profit was merely a tax-driven manipulation of the figures because as individuals the Tunises were taxed at lower rates so that they, as the sole shareholders, elected to distribute nearly all of Tunis Brothers' profits in the form of their salaries. Oxman opined that where a small corporation is in character similar to a sole proprietorship, as was Tunis Brothers under the Tunises, or a partnership, as under de la Rigaudiere and Smith, he calculated the business' real profit before payment of the owners' salaries. In other words, because the amount of those salaries were not fixed, but depended upon net profit, Oxman did not categorize the owners' salaries as regular business expenses.

Tunis Brothers therefore presented evidence only of gross profits. Yet upon cross-examination, Oxman admitted that the gross profits on any increased tractor sales would be reduced by "the whole litany of expenses that a company has other than direct sales." Additional sales would also have required additional costs associated with labor for assembly and warranties. Oxman further conceded that those additional expenses would include such things as salaries, utilities, taxes, rent, and insurance. For example, Oxman testified that he *assumed* that Tunis Brothers' floor plan insurance provided umbrella coverage and that any additional tractor stock on the premises would not

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11. For 1975, Tunis Brothers's net profit was reflected in its corporate tax return as $5,346.57, for 1976 as $383.10, for 1977 as $16,358.93, for 1978 as $347.72, for 1979 as $1,393.00, and for 1980 as $1632.04.

have raised the insurance premiums; he admitted, however, that he had neither read, nor inquired into, the terms of that policy.

This case clearly demonstrates the point that we made in *Deaktor*; absent quantification of numerous costs accruing with additional sales, the jury was left to speculate as to the amount of net profits recoverable in compensatory damages. Since the appropriate measure of damages is net profit, the plaintiffs must produce evidence of costs related to additional sales upon retrial.

In *Delahanty*, the court further limited proof of lost profits: "[a] review of the cases in Pennsylvania involving lost profits shows that the courts are reluctant to award them, except when the business concerned is established and not 'new and untried.' . . . There are no cases in Pennsylvania which deal with the award of damages for anticipated lost profits in a fraud case." *Id.* at 120, 464 A.2d at 1258.

Certainly in a technical sense Tunis Brothers was a 'new and untried' business concern when de la Rigaudiere and Smith assumed the ownership and control of the company. Some degree of uncertainty with respect to future profitability will almost always be associated with a transfer of ownership. However, in this case the business being transferred had already been in existence for almost fifty years. In this way, Tunis Brothers is distinguishable from other 'new and untried' businesses. In *Delahanty*, the Superior Court adopted two propositions which had arisen from a line of cases involving new and untried businesses in the estimation of alleged lost profits: (1) a business should be taken out of the 'new and untried' category if it can show a significant

interest in its product or service before the contract breach occurred, and (2) it is better that a jury hear evidence of future lost profits and decide its weight rather than allow the court to exclude the evidence entirely. *Delahanty*, 318 Pa. Super. at 123-24, 464 A.2d at 1260.

Tunis Brothers meets the "significant interest in their product" requirement; after fifty years of business, Tunis Brothers had an established clientele consisting of mushroom farmers. Given de la Rigaudiere's prior involvement in the business and Smith's business contacts with mushroom growers, it would be reasonable for a jury to conclude that this clientele would continue to purchase services and products from Tunis Brothers after the change of ownership. In addition, it is important to remember that the Pennsylvania Superior Court has concluded that "courts should liberally allow evidence of alleged lost profits to be submitted to the jury and let them decide if in light of the history of the business whether the amount of such profits could be estimated with reasonable certainty so as to allow recovery." *Delahanty*, 318 Pa. Super. at 12-24, 464 A.2d at 1260.

We are constrained to note that, when demonstrating net profits upon retrial, the plaintiffs must present a factually consistent theory unless much more appears than was developed at the first trial; they may not claim that, on the one hand, Tunis Brothers was an established business in order to overcome the presumption that lost profit damages for a new business are too speculative, *see Delahanty*, 318 Pa. Super. at 117-18, 464 A.2d at 1257-61, and on the other hand rely solely upon the attribute

of new management to forecast damages vastly exceeding the profitability of the old management. The plaintiffs rely upon Richard Tunis' cultivation of the mushroom growers' business to substantiate their claim that their future profits in this fifty year old business would not be speculative; yet they also disclaim Tunis Brothers' net profits and the inverse relationship between Ford and hardware sales achieved during Richard Tunis's management. In so doing, they anticipated that their youth and energy would have vastly increased Tunis Brothers profitability and that Richard Tunis's performance, allegedly curtailed by his age and ill health during the late 1970's, did not accurately forecast their future performance. This proposition would have to be thoroughly documented to survive.

We have less difficulty accepting the plaintiffs' choice of 1981 as the base year for its compensatory damages calculation. The plaintiffs contend that they chose this year because it was the only year in which they operated the Ford franchise, albeit for only a three-month frame of time. If net profits for the entire year of 1981 are properly extrapolated from the figures underlying those three months during which the plaintiffs operated the Ford franchise, then this would constitute an appropriate base year. This base year would factor in Smith's and de la Rigaudiere's more aggressive sales strategies, the possible benefit to Tunis Brothers from a doubling of active management, and physical improvements to the store. A jury could properly ascertain whether Tunis Brothers would have benefitted from Smith's and de la Rigaudiere's management, extrapolated from the January through March of 1981 time

period, in comparison to that of Richard Tunis' management during the 1977 through 1980 period. Certainly Smith and de la Rigaudiere had significant background in both the Tunis Brothers' business and the mushroom growers industry. Although Ford Motor now contends that they were "inexperienced," during the franchise negotiations, Eugene Fraher and Ken Harris were suitably impressed with the plaintiffs' experience and marketing strategies.

C.

Nevertheless, the plaintiffs' extrapolation of projected Ford tractor sales for the entire year of 1981 from the increased percentage of hardware sales in 1981 is not supportable. The evidence indicates that under Tunis, hardware and tractor sales growth enjoyed an inverse relationship. Upon remand, the base year projection should be based upon Ford tractor, not hardware, sales; and if the selected base year is 1981, to account for Smith and de la Rigaudiere's sales performance, then the projections must reflect the seasonal nature of tractor sales as well as the plaintiffs' marketing strategy and actual tractor sales during the peak season/three month period they had the franchise in 1981.

We note that Ford challenges the percentage growth rate suggested by Morton Oxman as derived from scant evidence and mere speculation. Oxman predicted annual growth rates of between 40 percent and not less than ten percent for the ten year period from 1981 through 1991, gradually decreasing that percentage to account for market saturation. Oxman admitted that this percentage growth rate was premised solely upon the youth

and vitality of Smith and de la Rigaudiere and calculated solely upon their expectations of how many tractors they could sell in a given year. Ford contends that the plaintiffs' failure with the Allis-Chalmers franchise as well as the mushroom industry depression demonstrate that Oxman's projected growth rates were wildly exaggerated.

Oxman was unable to correlate his percentage growth rate figures with any discernable data. He arrived at these figures by consulting with Smith and de la Rigaudiere concerning their sales goals and objectives. None of those underlying assumptions were substantiated at trial. Moreover, these objectives, although founded in good faith, cannot alone substantiate the growth rate percentages. This is true especially in light of the plaintiffs' admitted failure with their Allis-Chalmers franchise between 1982 and 1985.[12]

In our recent decision in *Advent Systems, Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991), we addressed an instance where a party seeking prospective lost profits in the context of a new and untried business relies purely upon industry projections rather than taking into account actual market results during the particular relevant time frame. In *Advent*, an expert relied heavily on industry projections prepared in 1986 and 1987. These projections predicted large increases in the sales of document systems. By the time of trial in

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12. Although the plaintiffs attribute that failure to the unsuitability of the Allis-Chalmers tractor to mushroom growers, whether their failure with that line is justified by the difference between Allis-Chalmers and Ford tractors is a factual issue particularly suited to a jury's resolution.

1989, however, actual results in the market place did not meet with the sanguine predictions in the market reports. Nevertheless, the expert relied on the projections rather than updating them based on actual results in the market. We concluded that "[w]e too have serious reservations about the validity of expert testimony based on prior predictions of sales for a given period when actual performance data for that same time span are available." *Id.* at 682.

Advent is instructive because its facts are remarkably similar to the case before us now. Oxman's projections of an increase in the growth rate of tractor sales by 40 percent in 1982 and an annual cumulative growth rate never less than 10 percent for the following nine years, are inconsistent with the state of the market during part of that time. The mushroom industry suffered a depression in the early 1980's and industry-wide sales of tractors in Chester County from 1983 to 1986 were flat, and in fact, did not reach the levels obtained in 1979. Tractor sales never reached the growth level of 40 percent estimated by the plaintiffs' expert. Although the plaintiffs claim that, like Wenner Ford's tractor sales during the 1980s, theirs would also have risen despite this depression, another tractor dealer Dudkewitz, the plaintiffs' own witness, testified that his tractor sales declined during that depression. Dudkewitz's sales may be more comparable to Tunis Brothers' sales than Wenner Ford's because both Dudkewitz and Tunis Brothers sold to mushroom growers affected by the depressed mushroom industry, while Wenner Ford's industrial customer base may have been less affected by mushroom industry woes. These factual judgments are properly ones

for the jury; we caution, however, that a growth percentage rate determined only by the plaintiffs' speculation about the number of tractors that they could sell within a given year requires the jury to speculate and thus cannot support a compensatory damage award.

Last, the plaintiffs challenge the district court's exclusion of their "minimum additional damages" figures. The plaintiffs attempted to produce evidence that they sustained additional damages beyond the ten-year timeframe in association with the franchise termination. The district court properly excluded this claim of damages as without merit and we will affirm on that point in light of our conclusion limiting damages to a time period not exceeding two to three years.

Based upon *Delahanty*, *Deaktor*, and *Advent*, we conclude that the plaintiffs may submit to the jury evidence of alleged lost *net* profits only. The evidence of lost *gross* profits was too speculative to support an award of damages. Therefore, we will grant a new trial on compensatory damages in which the plaintiffs shall be entitled to produce evidence pertaining to net lost profits and which shall account for actual results in the market place rather than those based purely on outdated and speculative predictions. Furthermore, testimony with respect to the anticipated lost net profits should be derived both from factors, independent of management, characteristic of Tunis Brothers such as overhead costs and seasonal sales, as well as from *demonstrable* attributes and the marketing strategy of the new management. A limitation of such evidence would balance the dictates of *Delahanty* that the evidence introduced have a sufficient basis (in this case

actual past sales production) for estimating with reasonable certainty the amount of the lost anticipated profits, with reasonable expectations of increased profitability under new management.

V.

We turn at last to the jury's award of punitive damages. Ford Motor and Ford Credit assert that the punitive damages award of $4 million is unwarranted and seek relief in the form of a new trial or remittitur. Because we will reverse the judgment against Ford Credit on both the fraud and antitrust counts, we will set aside that $1.2 million portion of the punitive damages award attributed to Ford Credit. *See, e.g., Emerick v. United States Suzuki Motor Corp.*, 750 F.2d 19, 22 (3d Cir. 1984) (liability for compensatory damages is a prerequisite to punitive damages). Having determined that the fraud claim against Ford Motor is supported by "that minimum quantum of evidence" required to uphold a jury's verdict, *Link*, 788 F.2d at 921, we turn to consider whether the record also supports an award of punitive damages.[13]

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13. We are also quite troubled by the grossly improper remarks of the plaintiffs' counsel during his closing argument at the close of the damages case. Frustrated by the district court's exclusion of much of the plaintiffs' evidence of damages, concerning non-tractor Ford sales, service or hardware sales, and the closing remarks of Ford Motor's counsel, the plaintiff's counsel argued to the jury:

> I ask you, I beg you, give us as much in damages as the Judge will permit you to give us. And then – and then it is going to be within your discretion, in the fraud case, to give us as large an amount of punitive damages – and I can't tell you what to add and I

We note that although "the decision of whether to award punitive damages and the amount to be awarded are within the discretion of the fact finder," *Delahanty*, 318 Pa. Super. at 129, 464 A.2d at 1263 (citations omitted), the legal and factual prerequisite for an award of punitive damages is outrageous conduct. *See Feld v. Merriam*, 506 Pa. 383, 395, 485 A.2d 742, 748 (1984) (adopting the Restatement (Second) of Torts, § 908(2), concerning the imposition of damages); *Martin v. Johns-Manville Corp.*, 508 Pa. 154, 169, 494 A.2d 1088, 1096 (1985) (plurality decision). The Restatement provides, in pertinent part:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

> can't tell you what to multiply, but *I ask you to give us as much punitive damages to make up for our inability to receive compensation for all of the nontractor Ford sales*, half of the total sales of this company projected to 10 years, *to make up for what we can't get*. (Emphasis added).

Although requested by Ford Motor, the district court did not give a curative instruction on this point. Given the disproportionate size of the punitive damage award as compared to the compensatory damage award, we are unable to conclude decisively that the jury dispassionately awarded punitive damages to deter "outrageous conduct" rather than making up for compensatory damages that were excluded for lack of evidence.

Restatement (Second) of Torts, § 908(2). The first factor required for punitive damages – outrageous conduct – rests upon the purpose of punitive damages to deter and punish such conduct. *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 100, 555 A.2d 800, 802 (1989); Restatement (Second) of Torts, comment b. As explained by the Supreme Court of Pennsylvania in *Kirkbride*, three factors are to be considered in awarding punitive damages:

> 1) the character of the act; 2) the nature and extent of the harm, and 3) the wealth of the defendant.

Kirkbride, 21 Pa. at 102, 555 A.2d at 803. Our resolution of the propriety of the award of punitive damages in this case rests upon the first factor.

The plaintiffs assert that the jury's verdict of liability on the fraud count sufficiently establishes outrageous conduct for punitive damages. We are mindful of the language of *Delahanty* which suggests that ". . . it is difficult to picture a fact pattern which would support a finding of intentional fraud without providing proof of 'outrageous conduct' to support an award of punitive damages." 318 Pa. Super. at 130; 464 A.2d at 1263. Nevertheless, this language of *Delahanty* constitutes dictum because the court in *Delahanty* found that the fraud committed was outrageous "and involved a bad motive." *Id.* at 132-33, 464 A.2d at 1264-65. There the defendant bank had accumulated confidential information concerning its customer's business and misappropriated that information to compete with and drive that customer out of business. *Id.* at 132, 464 A.2d at 1264.

Moreover, that dictum has not been adhered to by that court. *See Smith v. Renaut*, 387 Pa. Super. 299, 564 A.2d 188 (1989), where the court explicitly held that the evidence did not support "aggravated circumstances" necessary to add punitive damages to an award of compensatory damages in a fraud action. *Id.* at 309, 564 A.2d at 193.

> [Where] fraud . . . is the basis for the recovery of compensatory damages, . . . the same fraud is not alone a sufficient basis upon which to premise an award of punitive damages. . . . If the rule were otherwise, punitive damages could be awarded in all fraud cases. That is not the law. The rule, rather, is that for punitive damages to be awarded there must be acts of malice, vindictiveness and a wholly wanton disregard of the rights of others.

Id. (citations omitted). We are persuaded that this latter view, taken in conjunction with the Pennsylvania Supreme Court's adoption of the Restatement, requires a quantum of outrageous conduct in addition to that undergirding the fraud liability and compensatory damages.

The evidence in this case clearly did not meet that level of outrageous or malicious conduct required to sustain an award of punitive damages. Ken Harris and William Heck of Ford Motor favored the plaintiffs' application and they lobbied their superiors to approve the plaintiffs' franchise application. The ultimate decision, made by Ed Hasel, followed a full discussion of the merits of the application. Moreover, the plaintiffs were permitted to submit a second franchise application, and even as late as October of 1981

were encouraged to provide Ford Motor with information pertaining to a Cochranville location. Long before the sales agreement precipitating the plaintiffs' application, Ford Motor had determined that Kennett Square would be an attrition point for business reasons relating to a geographic shift in the market; the plaintiffs did not prove that their franchise application was disapproved as a result of malice on the part of Ford Motor.

Nor did the fraudulent misrepresentation inducing Tunis' resignation constitute the requisite outrageous conduct for punitive damages. The plaintiffs do not contest that under the terms of the franchise agreement, Ford Motor retained the unconditional right to terminate the Tunis Brothers' franchise upon 60 days notice. Although Ford Motor chose not to exercise that right, but, according to the jury verdict, chose to fraudulently induce Tunis' resignation, an election to exercise its termination upon sixty days notice would not have constituted outrageous conduct. An election not to grant a franchise application similarly does not justify punitive sanctions.

Because we have not found evidence in this record to support an award of punitive damages, we decline to resolve the thorny issue presented by the apparent conflict between the United States Supreme Court's decision in *Pacific Mutual Life Ins. Co. v. Haslip*, __ U.S. __, 111 S. Ct. 1032 (1991), which suggested that punitive damages that are disproportionate to compensatory damages may violate due process, and the Pennsylvania Supreme Court's decision in *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989), which held that because punitive damages are intended for punishment and deterrence, they need not be

commensurate with compensatory damages. Here, where a less far reaching conclusion requires that we vacate the award of punitive damages, we will refrain from considering the constitutionality of the Pennsylvania scheme. Lacking the basis of outrageous conduct, an award of punitive damages cannot stand. We will vacate the award of $2.8 million in punitive damages against Ford Motor.

VI.

We shall not address the issues raised by the plaintiffs on their cross-appeal as the plaintiffs waived them by failing to argue them in their briefs. *See Jackson v. University of Pittsburgh*, 826 F.2d 230, 237 (3d Cir. 1987); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025-26 (7th Cir. 1988). Instead of providing argument with respect to their issues, the plaintiffs merely referred to their pre- and post-trial briefs. We therefore decline to address those issues. In addition, to the extent that their cross-appeal concerns issues related to exclusion of the evidence of compensatory damages, since we are remanding for a new trial on that issue, we need not address those issues in any case.

VII.

In light of the foregoing, we will reverse the denial of the motion for judgment n.o.v. as to all of the defendants on the antitrust claim, and only as to Ford Credit only on the fraud claim. We will affirm the order of the district court denying Ford Motor and Wenner Ford's motion for judgment n.o.v. on the fraud claim. We will therefore remand this action for a new trial on compensatory damages against Ford Motor and Wenner Ford on

the fraud count. We will vacate the award of punitive damages in its entirety.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed January 10, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1797 and 90-1816

TUNIS BROTHERS COMPANY, INC.;
RICHARD N. DE LA RIGAUDIERE; and
DAVID C. SMITH,

vs.

FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC.; JOHN S. WENNER; JOHN WATSON; DOUGLAS N. CRAWFORD; EUGENE W. FRAHER; E. S. HASEL; HUGH NICKEL; KENNETH E. HARRIS; C. W. WENZEL

FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, and WENNER FORD TRACTOR, INC.,

Appellants in No. 90-1797

TUNIS BROTHERS COMPANY, INC.;
RICHARD N. DE LA RIGAUDIERE; and
DAVID C. SMITH,

Appellants in No. 90-1816

vs.

FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC.; JOHN S. WENNER; JOHN WATSON; DOUGLAS N. CRAWFORD; EUGENE

W. FRAHER; E. S. HASEL; HUGH NICKEL; KENNETH E. HARRIS; C. W. WENZEL

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 82-05557)

Before: BECKER, MANSMANN and SCIRICA,
Circuit Judges.

ORDER AMENDING SLIP OPINION

It is ORDERED that the slip opinion in the above captioned case, filed December 27, 1991, be amended as follows:

At page 38, lines 19 and 20, delete the words "and Wenner Ford" so that the sentence reads "To the contrary, examining the evidence in the light most favorable to the plaintiffs, we conclude that the trial record is replete with clear and convincing evidence which supports the jury's finding of fraud against Ford Motor."

At page 42, line 4, delete the words "and Wenner Ford" so that the first sentence of the first full paragraph reads "This evidence clearly supports the jury's determination that Ford Motor committed a fraud against the plaintiffs."

At page 63, line 6 under VII., delete the words "and Wenner Ford's" and add and "'s" to "Motor" so that that sentence reads "We will affirm the order of the district court denying Ford Motor's motion for judgment n.o.v. on the fraud claim."

At page 63, last line, delete the words "and Wenner Ford" so that that sentence reads "We will therefore remand this action for a new trial on compensatory damages against Ford Motor on the fraud count."

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Dated: January 10, 1992

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

SALLY MRVOS
CLERK

FOR THE THIRD CIRCUIT

TELEPHONE
215-597-2995

21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

January 10, 1992

Honorable Louis C. Bechtle
Robert C. Helm, Esquire
Steven T. Stern, Esquire
Arnold R. Ginsburg, Esquire

In re: Tunis Brothers Co., Inc., et al. v.
Ford Motor Co., etc. et al.
Nos. 90-1797 and 90-1816

Dear Judge and Counsel:

The following corrections to my opinion in the above-captioned slip opinion should be made known to all relevant parties:

Page 3, first full ¶, line 8: add the word "Company" after "Ford Motor Credit"

Page 4, line 8: the word "plaintiff's" should read "plaintiffs' "

Page 4, line 16: add a "," after the word "profits"

Page 14, line 8: the cite should read "832 F.2d at 259" rather than 832 F.2d at 2559.

Page 14, line 25: the cite should read "763 F.2d 1489" rather than 763 F.2d 15 1489

Page 15, second ¶, line 14: delete the word "the" between the words "for" and "other"

Page 24, first full ¶, line 10: add a ")" after "(1966)" so it reads "(1966))"

Page 24, first full ¶, line 19: delete the word "it" between the words "rather" and "is"

Page 25, first full ¶, line 6: delete the word "at" and replace it with the word "from," so it reads "also purchased parts from, and had his previous"

Page 28, line 25: add an "s" to the word "restraint"

Page 36, first full ¶, line 3: add the words "he had been" between the words "although" and "involved"

Page 37, second full ¶, line 3: delete the word "Superior" and add the word "Supreme"

Page 37, second full ¶, line 4: delete the words "in *Delahanty*" and replace with the word "has"

Page 38, Per Order Amending Slip Op, first full ¶, lines 8-9: delete the words "and Wenner Ford"

Page 42, Per Order Amending Slip Op, first full ¶, line 2: delete the words "and Wenner Ford"

Page 43, first full ¶, line 8: add the word "Motor" after the word "Ford" so it reads "Ford Motor."

Page 44, first full ¶, first line: add the word "will" after the word "We"

Page 44, first full ¶, line 3: add the word "the" between the words "for" and "damage"

Page 44, first full ¶, line 7: add the word "will" between the words "we" and "examine"

Page 44, footnote 7, line 11: add an "s" to the word "Kursh'" so it reads "Kursh's"

Page 46, first full ¶, first line: delete the "apostrophe" after the word "defendants' " so it reads "defendants"

Page 49, footnote 10, line 2: add an "apostrophe" after the word "Brothers" so it reads "Brothers' "

Page 52, last line: add a "," after the word "hand"

Page 53, line 9: delete the "s" in the word "Tunis's" so it reads "Tunis' "

Page 53, line 12: add an "apostrophe" to the word "Brothers" so it reads "Brothers' "

Page 53, line 13: delete the "s" in the word "Tunis's" so it reads "Tunis' "

Page 57, first full ¶, line 5: the word "timeframe" should read "time frame"

Page 58, footnote 13, line 7: the word "plaintiff's" should read "plaintiffs' "

Page 60, line 7: add "§ 908," between the words "Torts," and "comment"

Page 60, second to last line: add the word "to" between the words "and" and "drive"

Page 63, per Order Amending Slip Op last ¶, line 6: delete the words "and Wenner Ford's" and add " 's" to the word "Motor" so it reads "Motor's"
last line: delete the words "and Wenner Ford"

Very truly yours,

/s/ SALLY MRVOS

SALLY MRVOS, Clerk

SM/af

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

SALLY MRVOS
CLERK

FOR THE THIRD CIRCUIT

TELEPHONE
215-597-2995

21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

January 24, 1992

West Publishing Company
Editorial Department
50 Kellogg Boulevard
St. Paul, MN 55165

Re: *Tunis Brothers Co., Inc. v. Ford Motor Co.*
Nos. 90-1797, 90-1816

The Court has directed me to advise you that the following correction should be made to the published Opinion which was filed on December 27, 1991.

Page 7, 15th line from the bottom – "15 U.S.C. §§ 18 and 25" should read "15 U.S.C. §§ 18 and 24"

Thank you for your cooperation.

Very truly yours,
SALLY MRVOS, CLERK

/s/ KATHLEEN O'TOOLE

Kathleen O'Toole
Deputy Clerk
Direct Dial: 597-5846

ko

cc: Robert C. Heim, Esq.
Steven T. Stern, Esq.
Arnold R. Ginsburg, Esq.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC.	:	CIVIL ACTION
	:	
v.	:	FILED DEC. 3, 1990
	:	
FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, and WENNER FORD TRACTOR, INC.	:	NO. 82-5557

MEMORANDUM AND ORDER

BECHTLE, *Ch.J.* DECEMBER 3, 1990

Presently before the court are defendants' motions for judgment notwithstanding the verdict pursuant to Fed.R.Civ.P. 50, or, in the alternative, for a new trial or remittitur pursuant to Fed.R.Civ.P. 59. For the reasons set forth below, defendants' motions are denied.

I. BACKGROUND

A. Procedural History

An understanding of the serpentine procedural history of this complex litigation will help place these motions in context. On December 15, 1982 plaintiffs Tunis Brothers Company, Inc., Richard N. de la Rigaudiere and David C. Smith filed a complaint charging defendants Ford Motor Company, Ford Motor Credit Company, Wenner Ford Tractor, Inc., John S. Wenner, and Ford employees John Watson, Douglas N. Crawford, Eugene W. Fraher, E.S. Hasel, Hugh Nickel, Kenneth E. Harris, and C.W. Wenzel with a conspiracy to violate several provisions of the antitrust laws, including §l of the Sherman Act, 15 U.S.C. §1, §§7 and 14 of the Clayton Act, 15 U.S.C. §§18 and 25, and with various state law tort and breach of contract claims arising out of Ford's failure to renew the Tunis Brothers tractor franchise upon its sale from Richard and Isabelle Tunis to plaintiffs de la Rigaudiere and Smith. In an order dated June 22, 1983, this court dismissed the

claim against defendant Wenzel for lack of personal jurisdiction, as well as plaintiffs' claims under the Clayton Act for failure to state a claim. *Tunis Brothers Company, Inc. v. Ford Motor Co.,* No. 82-5557 (E.D. Pa. June 22, 1983). In a subsequent opinion, this court granted defendants summary judgment on the remaining federal counts finding no genuine issues of material fact from which a reasonable jury could infer an antitrust conspiracy. *Tunis Brothers Company, Inc. v. Ford Motor Company,* 587 F. Supp. 267 (E.D. Pa. 1984). The court dismissed the pendent state law claims under the doctrine of *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966). *Id.* at 275.

The United States Court of Appeals for the Third Circuit reversed the award of summary judgment in *Tunis Brothers Company, Inc. v. Ford Motor Company,* 763 F.2d 1482 (3d Cir. 1985)(hereinafter *"Tunis I"*). The court stated that "[v]iewing the evidence in the light most favorable to plaintiffs, we find that the evidence presented supports an inference that the close ties between . . . defendants Ford and Wenner Ford led to an illegal agreement, even if implicit." 763 F.2d at 1499.

On petition for writ of certiorari, the United States Supreme Court vacated the decision in *Tunis I* and remanded the case for reconsideration in light of its decision in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The *Matsushita* court held that where an antitrust defendant's conduct is consistent with both permissible competition and illegal conspiracy, a plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently" in order to survive a motion for summary judgment. 475 U.S. at 588, *quoting, Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764 (1984). On remand the Third Circuit found the "evidence adduced by appellants to satisfy this burden [to be] substantial but not overwhelming . . ." and remanded the case to the district court for trial on all

counts. *Tunis Brothers Company, Inc. v. Ford Motor Company,* 823 F.2d 49, 51 (3d Cir. 1987) (hereinafter *"Tunis II"*).

The amended complaint on remand contained six counts. Count I alleged a per se violation of §l of the Sherman Act based on a horizontal conspiracy to allocate markets. Count II alleged that the franchise agreement between Tunis Brothers and Ford was a contract in restraint of trade in violation of Sherman §1. Count III alleged the same conduct as count I only through the use of "dirty business tricks". Count IV likewise set forth the conduct in count I but charged defendants with a violation of Sherman §l under the rule of reason doctrine. Count V alleged the common law torts of fraud, misrepresentation and tortious interference with contractual relations. Finally, count VI charged defendant Ford with breaching the franchise contract between the parties.

Prior to trial defendants once again moved for summary judgment claiming that plaintiffs' complaint failed either to state a per se violation of the Sherman Act or to demonstrate the adverse effects on competition in the relevant product and geographic markets as required under the rule of reason. The court denied defendants' motion without prejudice to raise these arguments at the close of plaintiffs' case. *Tunis Brothers Company, Inc. v. Ford Motor Company,* 696 F. Supp. 1056 (E.D. Pa. 1988). The court also granted plaintiffs' motion to bifurcate the trial between issues of liability and damages and denied plaintiffs' motion for disqualification of this court.[1]

---

1. Plaintiffs sought to disqualify the Honorable Louis C. Bechtle pursuant to 28 U.S.C. §455 on the grounds that he had appeared on the same panel discussion as defense counsel Robert C. Heim during a meeting of the Philadelphia Bar Association. This panel discussed several features of multidistrict litigation and in no way touched upon any issues related to this case. Such activity

At the close of the evidence, the court granted defendants a directed verdict on counts I, II, III and VI. Furthermore, the court dismissed all claims against defendants Watson, Crawford, Fraher, Hasel, Nickel and Harris in their individual capacities. Eight Special Interrogatories were then sent to the jury to determine whether Ford, Ford Credit, Wenner Ford and John S. Wenner had either defrauded Tunis Brothers or had conspired to violate §1 of the Sherman Act under the rule of reason analysis. The jury's verdict found that Ford, Ford Credit and Wenner Ford had conspired to terminate the Tunis Brothers dealership, that the conspiracy had an adverse economic impact on the intraband market for Ford tractors in the Kennett Square area, and that the adverse impact on competition outweighed any beneficial competitive effects in that market. The jury also found that Ford and Ford Credit had defrauded plaintiffs in their attempt to secure a new Ford franchise. John Wenner was found not liable on all charges.

After denying defendants' motion for a new trial on liability, the damages phase of the trial commenced. Plaintiffs' presentation to the court was a confused and haphazard mix of information frequently unsupported by any authenticating documentation. Nonetheless, the court sent all *admissible* evidence of plaintiffs' damages to the jury based on a lost profit formula. The jury returned a verdict of $227,605.50 against defendants Ford, Ford Credit and Wenner Ford on the antitrust claim. Consistent with the court's instructions, the jury

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benefits both bench and bar and is not the sort of conflict contemplated by §455. Furthermore, this panel discussion was well advertised by the Philadelphia Bar Association in pamphlets and legal newspapers. Any objection by plaintiff's counsel should have been raised at that time or it is waived. *United States v. Nobel,* 696 F.2d 231, 236 (3d Cir. 1982), *cert. denied,* 462 U.S. 1118 (1983) (party may waive objection under §455(a)) The fact that plaintiff's counsel was delinquent in his bar association dues and did not receive these periodicals is an insufficient excuse to prevent waiver.

returned a verdict of the identical sum against defendants Ford and Ford Credit on the fraud count, with Ford liable for $159,323.85 and Ford Credit liable for $68,281.65. Lastly, the jury found Ford liable for $2,800,000.00 and Ford Credit liable for $1,200,000.00 in punitive damages. Defendants now move for judgment notwithstanding the verdict or a new trial alleging erroneous rulings by the court, that the jury's verdict was against the weight of the evidence, and that plaintiffs claims are insufficient as a matter of law. In the alternative, defendants seek a remittitur of the jury verdict on damages or a new damages trial.

B. Facts

The following recitation represents the undisputed facts and facts reasonably inferred from the verdict of the jury, taken in the light most favorable to plaintiffs. Tunis Brothers Company, Inc. was founded by Richard N. Tunis and his brother Robert in 1934 as a tractor and farm supply business in Kennett Square, Pennsylvania, known colloquially as the "mushroom capital of the world". In 1959, Tunis Brothers became a Ford Motor Company franchised dealership selling Ford tractors, equipment and accessories, as well as non-Ford products. From May 1, 1974 to the resignation of Richard Tunis on March 17, 1981, the parties relationship was governed by a "Dealer Sales and Service Agreement" (the "franchise agreement"). *See* Plaintiff's Exhibit 1. It is undisputed that this franchise agreement expressly required Ford's prior written consent to transfer of ownership of the Ford franchise and additionally permitted termination of the franchise at will on thirty (30) days written notice by Tunis Brothers or on sixty (60) days written notice by Ford. Plaintiffs' Exhibit 1, at ¶14.

Richard N. de la Rigaudiere was the nephew of Richard and Isabelle Tunis. He had worked at Tunis Brothers since 1966, eventually becoming the store's parts manager. David C. Smith was the owner of a local company named Fert-L Soil and a steady customer and

friend of Richard Tunis. In March 1980, de la Rigaudiere and Smith approached Richard Tunis about the prospect of purchasing Tunis Brothers. The negotiations culminated in the sale of Tunis Brothers to de la Rigaudiere and Smith in March 1981 for the price of $450,000.00.

Wenner Ford is a Delaware corporation with its principal place of business in Concordville, Pennsylvania-about eleven miles east of Kennett Square. Wenner Ford was the authorized Ford dealer of farm and industrial tractors nearest to Tunis Brothers. It was established as a privately-owned dealership by John Wenner, a former Parts Operations Manager for Ford in Michigan, in 1977. As a result of a serious cash-flow problem, John Wenner recapitalized Wenner Ford as a Ford Dealer Development dealership in July, 1979 with the assistance of Ford employees Eugene Fraher, John Watson and Hugh Nickel, and Ford Motor credit employee Howard W. Stoneback.[2] Under the terms of this program, Ford purchased 79% of the equity of Wenner Ford and owned all of its voting stock. John Wenner retained 21% of the equity and operated Wenner Ford as its President and Chief Executive Officer. Wenner was to buy out Ford's interest incrementally and eventually return to private dealer status.

During their negotiations for the purchase of Tunis Brothers, de la Rigaudiere and Smith contacted John Watson, Zone Manager for Ford's Tractor Operations in the area including Kennett Square and Concordville. At the suggestion of Watson, plaintiffs met Watson at Wenner Ford on May 23, 1980. They were introduced to

---

2. In a handwritten letter dated October 12, 1979, Stoneback wrote to J.S Rennie, Area Manager of Ford Motor Credit Company,:

> "I am happy to submit a file on the subject dealer [Wenner Ford Equipment Company] switching from Private Capital to Dealer Development. This has been a high risk account for us. If the corporation did not go DD, it would have gone 'down the tube' at some point."

Plaintiff's Exhibit 141.

John Wenner and given a tour of his facility. Watson, de la Rigaudiere and Smith proceeded to lunch at the Concordville Inn where Watson informed them that Ford did not wish to renew the Tunis Brothers dealership in Kennett Square after its sale or the retirement of Richard Tunis and that the Kennett Square market was slated for Wenner Ford. Watson recommended that plaintiffs consider opening a dealership in Oxford, or Cochranville, Pennsylvania, located some fifteen miles west of Kennett Square. The record shows that John Wenner was sitting at a nearby table during this discussion. Watson subsequently wrote in his Ford New Dealer Prospecting Report that plaintiffs were qualified to operate a Ford franchise in the Oxford/Cochranville area.

Skeptical of Watson's motives regarding Wenner Ford, plaintiffs contacted his superior Eugene Fraher, the Northeastern District Manager of Ford Tractor Operations. Plaintiffs met with Fraher, and his assistant Edward Poole, on June 13, 1980 in Fraher's office in Cohoes, New York. Fraher confirmed that the Kennett Square dealership was an attrition point but told plaintiffs they could possibly remain in Kennett Square for two to three years, after which time they would be required to move to Cochranville. Fraher gave them dealer applications and told them to submit a business plan to him. He also warned them that any purchase of Tunis Brothers should be made contingent upon Ford's approval of their business plan. What Fraher did not disclose was that his duties at Ford included oversight of Ford Dealer Development companies in his territory and that he was then a Director and Senior Vice-President of Wenner Ford.

Plaintiffs obtained mortgage financing for the purchase of Tunis Brothers through the Chester County Industrial Development Authority and on December 16, 1980 signed an Agreement of Sale with Richard and Isabelle Tunis. It is undisputed that this agreement did

not contain Fraher's admonition making the sale contingent on Ford's approval of the franchise. In January 1981, plaintiffs sent these materials, along with their business plan and dealer applications, to Fraher and Douglas Crawford, who had succeeded Watson as Ford's Zone Manager. Plaintiffs' Exhibit 14.

On March 3, 1981, Crawford and Hugh Nickel, Dealer Replacement Representative for the Northern Region of Ford Tractor Operations, met with de la Rigaudiere, Smith and Richard and Isabelle Tunis at Tunis Brothers. Plaintiffs testified that Crawford stated they were sent by Fraher. Nickel explained that Ford would not process an application for a replacement dealer unless the present dealer submitted a letter of resignation. Nickel presented Richard Tunis with a form letter of unconditional resignation and a termination notice for Richard Tunis to send to Ford. Nickel told them, in a representation which forms the core of plaintiffs' claim of fraud, that the resignation letter would not be processed until the new dealership application was approved but, instead, would be "held in a drawer". He also recorded plaintiffs' financial information and had de la Rigaudiere and Smith sign blank credit applications which he claimed would be typed up at his office and returned to plaintiffs for their review.

Plaintiffs were not sent copies of this first completed application which misstated plaintiffs' investment in Tunis Brothers. Smith and de la Rigaudiere were to invest $25,000.00 each in the dealership for a total investment of $50,000.00. The credit application prepared by Nickel reflected only a $5,000.00 investment in the business. Plaintiffs further testified that no mention of the move to Cochranville was made at this meeting. Despite his assurances that plaintiffs would be approved, Nickel's New Dealer Prospecting Report stated that de la Rigaudiere and Smith were not qualified businessmen and did not have adequate financing to be approved for credit.

The closing of the sale of Tunis brothers took place on March 16, 1981, thirteen days after the meeting with Nickel. On March 17 Richard Tunis sent his letter of resignation and termination notice to Ford, which were forwarded on March 23 by Nickel and Fraher to Market Representation Manager Kenneth E. Harris for *immediate* action. Harris, however, held the letter pending the processing of plaintiffs' dealership and credit applications.

After receiving Nickel's letter of March 23 and plaintiffs' application, Stoneback of Ford Credit telephoned Nickel in the presence of his Assistant Branch Manager Harry Saxton. Saxton prepared a chronology of subsequent events. Under an entry dated "4/81", Saxton wrote:

> Branch received the file from T&I [Tractor and Implementations] on subject dealer [Tunis Brothers]. It reflected the replacement Principals and $5,000.00 total investment on Pro-Forma and also reflected $400M Mortgage loan, $168M negative net worth. Branch discussed prospective dealer file with Hugh Nichol [sic] of T&I *who confirmed a small $5,000.00 investment.* He also stated that T&I was not confident the two principals could sell enough equipment to generate profits to repay the $400M note. *He also implied that T&I did not want the deal approved.* He also stated that the transfer of the dealership ownership without T&I approval was reason for the franchise to be terminated (emphasis added).

Plaintiffs' Exhibit 73. Although Stoneback did not recall this conversation and Nickel, in deposition, expressly denied confirming the inaccurate $5,000, investment, the jury obviously believed Saxton's chronology and supporting testimony.

On April 1, 1981, Stoneback telephoned Harris that Ford Credit would not approve plaintiffs' credit application. On April 2 Richard Tunis was informed by letter

signed by John J.L. Johnson, General Sales Manager of Ford Tractor Operations, that his resignation had been accepted effective immediately. When plaintiffs were informed of this decision, they discovered the erroneous information in their credit application prepared by Nickel. Plaintiffs were subsequently permitted to submit a second credit application containing the correct information. However, before a decision on the revised credit application was reached, plaintiffs' dealership application was rejected. This information was conveyed to plaintiffs by letter dated August 7, 1981 from E.S. Hasel, the Regional Manager for the Northern Region of Ford Tractor who, like Fraher, was a director and senior vice-president of Wenner Ford. Tunis Brothers subsequently became a franchised dealer of Allis-Chalmer farm tractors but is currently in Chapter 11 bankruptcy.

I. DISCUSSION

A. Standard of Review

Fed.R.Civ.P. 50(b) permits a party who has made an unsuccessful motion for directed verdict at trial, to move the court to set aside an adverse verdict and either enter judgment in favor of the moving party as a matter of law, or to order a new trial. In deciding a motion for judgment notwithstanding the verdict ("j.n.o.v."), a court is not permitted to reweigh the evidence or to judge the credibility of witnesses. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977). Rather, the court must determine as a matter of law that there is but one reasonable conclusion as to the proper judgment and that the jury's verdict will result in a manifest injustice. *Whitmore v. Bobst Group, Inc.*, 668 F.Supp. 421, 424 (E.D. Pa. 1987), *citing, Woodward & Dickerson, Inc. v. Yoo Hoo Beverage Co.*, 502 F.Supp. 395, 397 (E.D. Pa. 1980), *aff'd*, 661 F.2d 916 (3d Cir. 1981).

Constitutional considerations mandate a strict standard in deciding a motion for j.n.o.v. *Berndt v. Kaiser*

Aluminum & Chemical Sales, Inc., 789 F.2d 252, 258 (3d Cir. 1986). Consequently, "[w]hen deciding a motion for judgment notwithstanding the verdict, the trial judge must determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict. *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987), *cert. denied*, ____ U.S. ____, 109 S.Ct. 782 (1989).

Likewise, in deciding a motion for a new trial under Fed.R.Civ.P. 59, a court must not substitute its own view of the evidence for that of the jury. *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960). The court must, instead, search the record to determine whether prejudicial error occurred or whether the verdict was clearly against the weight of the evidence. *Id.*

B. The Antitrust Claim

To sustain their claim that defendants unreasonably restrained trade in violation of §l of the Sherman Act, 15 U.S.C. §1, plaintiffs' proof at trial must have established: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of the conspiracy. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-82 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The Third Circuit's prior decisions in this case clearly contemplated sending the issue of conspiracy to the jury. The court finds that the jury had sufficient evidence on which to base a finding of liability on this element and therefore will not address that issue.[3]

---

3. Defendants' claim that the court's failure to instruct the jury that the evidence must have proven a motive to conspire was error

Undoubtedly, the verdict in this case ultimately turned on the jury's definition of the relevant product and geographic markets. As this court stated in a prior opinion, "a diminution in intrabrand competition in an oligopolistic market exercised by one with considerable market power may [ ] result in a violation of the Sherman Act." 696 F.Supp. at 106, *citing Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52-54 (1977). Since Wenner Ford Tractor and Tunis Brothers were the only Ford Tractor dealers in the geographic market defined by the jury, Ford had intrabrand market power and the elimination of Tunis Brothers resulted in an adverse effect on the *intra*brand market for Ford tractors if the jury's market definition was correct.

This market definition was a question of fact for the jury. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 28 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). Consequently, this court must determine whether, viewing the evidence in the light most favorable to the plaintiffs, the jury's definition of the product market as the intrabrand market for Ford tractors, and the geographic market as the "Kennett Square Area" as set forth in P-302, was against the weight of the evidence and therefore incorrect as a matter of law.

NOTES *(Continued)*

and requires a new trial. In support, defendants' cite the Supreme Court's decision in *Matsushita, supra*, 475 U.S. 574, a case alleging an antitrust violation based on 20 years of predatory pricing.

The court gave the standard charge on antitrust conspiracy as set forth in 3 E.Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions*, §§90.07-10 (1987) & Supp. and American Bar Association, *Sample Jury Instructions in Civil Antitrust Cases* (1987). These instructions, taken as a whole, are sufficient in instructing the jury on the elements of antitrust conspiracy. To the extent they fail to incorporate defendants' requested instruction on motive, their motion for a new trial is denied.

Market definition under the antitrust laws is generally governed by the microeconomic concept of cross-elasticity of demand. *United States v. E.I.duPont deNemours & Co.*, 351 U.S. 377, 395 (1956). As Justice Reed stated:

> In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that (part of trade or commerce) monopolization of which may be illegal.

351 U.S. 394-95. *See also Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania*, 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) ("the relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks . . .boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand."). However, these well-known cases arose under §2 of the Sherman Act prohibiting monopolization or attempts to monopolize. The extent to which this analysis applies to §1 remains subject to debate.

In *Columbia Metal, supra*, 579 F.2d 20, Judge Adams articulated the rationale for applying a somewhat different approach to market definition under §1:

> The §2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. §1, in contrast, is concerned with patterns of competition as a means of judging whether a restraint of trade is unreasonable. Thus, rival products might provide sufficient competition to foreclose a finding of monopolization, yet the degree of insularity of the initial product might allow a finding of illegal restraint of trade in regard to restrictions imposed within the

> initial market. For instance, stifling intrabrand competition may violate §1, while "monopoly" over a given brand would clearly not run afoul of §2.

579 F.2d at 27 n.11. The court believes that this approach forms the proper basis for analyzing §1, which seeks to punish collusive as opposed to unilateral restraints of trade. It also forms a rational basis for the jury's interpretation of the evidence in this case and precludes defendants' request for post-trial relief.

Definition of an intrabrand market is unusual for it virtually assumes market power absent an intricate, and potentially inefficient, distribution system. *See, e.g., GTE Sylvania, supra*, 433 U.S. at 52-54 (interbrand competition is the primary concern of the antitrust laws). *See also Business Electronics Corp. v. Sharp Electronics Corp.*, ____ U.S. ____, 108 S.Ct. 1515 (1988). However, as the court stated in *Brown Shoe*:

> [W]ithin this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Brown Shoe, supra, 370 U.S. at 325, *quoted in Columbia Metal, supra*, 579 F.2d at 27. *See also* 2 Areeda & Turner, *Antitrust Law*, §504 (1978 & Supp. 1990).

Plaintiffs presented significant evidence through the testimony of Richard Tunis and several tractor customers throughout the Kennett Square area that the Ford tractor possessed features which made it unique to mushroom growers. Thus, this is not a case like *Mogul v. General Motors Corp.*, 391 F.Supp. 1305 (E.D. Pa. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976) where product differentiation rested largely on name recognition.

Rather, plaintiffs' evidence persuaded the jury that the Ford tractors possessed fundamentally different features which were preferred by mushroom farmers and which were not available in competitors' models. These include size of the Ford tractor, its composting capabilities and the adaptability of it parts and equipment to the mushroom farmer's needs. Viewing this evidence through the prism of Rules 50 and 59, the court is unwilling to overturn the jury's definition of an intrabrand product market.

The definition of the geographic market as the "Kennett Square area" as set forth in P-302 was likewise a question of fact for the jury. The Supreme Court has defined the relevant geographic market as "the market area in which the seller operates, and to which the purchaser can practically turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320,331-32 (1961). Once again, the testimony of Richard Tunis and the mushroom farmers presented by plaintiffs persuaded the jury that customers for the Ford tractors used by the mushroom farmers looked only to the "Kennett Square area" as defined in P-302. Practical considerations such as distance traveled and access to parts and repairs support this conclusion. Accordingly, the court will not disturb the jury's definition of the geographic market as the Kennett Square area.

Having concluded that there was sufficient evidence to support the jury's conclusion that Ford tractors formed a unique product market to the mushroom growers in the Kennett Square area, adverse impact on competition in this market is a foregone conclusion. Plaintiffs' theory that Ford terminated the Tunis Brothers dealership in order to allocate its market share to Ford's only other area distributor – a company 79% owned by Ford and which owed Ford substantial sums under its dealer development program – is not so against the weight of the evidence as to render the verdict unjust.

C. The Fraud Claim

The elements of a claim for fraudulent misrepresentation under Pennsylvania law are (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient on the misrepresentation and (5) damage to the recipient as a proximate result. *Delahanty v. First Pennsylvania Bank, N.A.,* 318 Pa.Super. 90, 464 A.2d 1243 (1983); *Scaifelo v. Rockwell-Standard Corp.*, 446 Pa. 280-285 A.2d 451,454 (1971), *cert. denied,* 407 U.S. 920 (1972). Each element must be proven by clear and convincing evidence. *Scaifelo*, 446 Pa. at 285.

Defendants Ford and Ford Credit claim that plaintiffs did not prove a misrepresentation on which they could have reasonably relied and therefore the jury's verdict on fraud must be set aside. The court disagrees. Viewing the evidence in the light most favorable to plaintiffs, Hugh Nickel's representation to plaintiffs during their meeting of March 3, 1981 that Richard Tunis's resignation would be "held in a drawer" until plaintiffs application for a dealership was *approved*, induced Tunis Brothers, through Mr. Tunis, to resign his dealership.

Furthermore, both Mr. and Mrs. Tunis and plaintiffs testified that they would not have consummated the March 13 settlement for the purchase of Tunis Brothers had Nickel not made these representations. The jury found that Nickel, acting on behalf of Ford *and* Ford Credit (in taking, and subsequently misrepresenting, plaintiffs' financial information), fraudulently induced Tunis Brothers to resign as a Ford dealership and be sold to plaintiffs so that Wenner Ford, an entity 79% owned by Ford Motor Company, could appropriate its business. "It has been said that fraud may induce a person to assent to something which he would not otherwise have done, or it may induce him to believe that the act which he does is something other than it actually is." *Delahanty, supra*, 318 Pa. Super. at 97, 464 A.2d at 1251-52.

This was the jury's view of the evidence in this case and the court does not find it incorrect as a matter of law.

D. Damages

Defendants claim that the jury's award of compensatory damages, identical under both the antitrust and fraud claims and calculated on the basis of lost gross profits on Ford tractor sales by Tunis Brothers, was excessive, not supported by the evidence and incorrect as a matter of law. Although the court excluded much of plaintiffs' damage evidence at trial, the court believes that the evidence finally submitted to the jury was sufficient to support the damage verdict.

First, defendants object to the fact that plaintiffs were allowed to introduce evidence of lost gross profits to the jury. Defendants claim that lost net profits are the only correct formula for compensatory damages under the antitrust claim. However, as the Supreme Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969):

> [D]amage issues in [antitrust] cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs."

395 U.S. at 123-24 (citations omitted]. Accordingly, courts have permitted evidence of lost gross profits where incremental operating expenses in connection with increased sales would have been nominal. *See Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 375 F.Supp. 610 (E.D. Pa. 1974), *modified* 383 F.Supp. 586 (E.D. Pa. 1974) (Bechtle, J.); *N.W. Controls, Inc. v.*

Outboard Marine Corp., 333 F.Supp. 493, 525 (D. Del. 1971); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F. 2d 980, 996 (5th Cir. 1983); *Com-Tel, Inc. v. DuKane Corporation*, 669 F.2d 404 (6th Cir. 1982); *Trabert & Hoeffer, Inc. v. Piaget Watch Co.*, 633 F.2d 477 (7th Cir. 1980); *Distillers Distribution Corporation v. J.C. Millett Co.*, 310 F. 2d 162 (9th Cir. 1962).

Plaintiffs' evidence of lost gross profits was submitted to the jury, along with defendants' evidence and arguments that net profits was the proper formula. The jury accepted neither parties' calculation as to compensatory damages but, instead, reached a compromise verdict. Given the conflicting damage evidence at trial, the court does not believe that the evidence presented to the jury was incorrect as a matter of law. The jury's verdict on compensatory damages under the antitrust claim will not be set aside.

Defendants next argue that any lost profit calculation for compensatory damages on plaintiffs fraud claim is incorrect since Pennsylvania law limits a defrauded plaintiff to "actual loss" and not the "benefit of the bargain." *Delahanty, supra,* 318 Pa. Super. at 101, 464 A.2d at 1257. However an "actual loss" and a lost-profit calculation for a going concern are by no means mutually exclusive. Indeed, in *Delahanty* itself, the court recognized that lost profits were recoverable in both tort and contract and that "the evidence of alleged lost profits was properly admitted into evidence . . ." 318 Pa. Super. at 103, 464 A.2d at 1261. The court merely found that a lost profit formula was too speculative to apply to a new business with no past record of profits. *Id.*

Although Tunis Brothers was to be under the control of new management after the sale, the evidence showed that it was a presence in the Kennett Square community for some fifty years and had a well-established customer base and track record upon which to calculate lost profits. Since the result of the fraud found by the jury was the elimination of plaintiffs' Ford franchise, a lost profit calculation on Ford tractor sales

for compensatory damages under plaintiffs' fraud claim was not incorrect under Pennsylvania law. *Delahanty, supra*, 318 Pa. Super. at 105, 464 A.2d at 1261-62.

In accordance with this theory, defendants claim that if a lost profit formula for future damages is based on past sales, then plaintiffs' calculations as to growth projections are inconsistent and unreasonable and cannot provide the basis for damages in this case. Plaintiffs' evidence on lost future gross profits on Ford tractor sales was less than precise. However, as the court in *Delahanty* stated, "under Pennsylvania law, damages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences." 318 Pa. Super. at 101, 464 A.2d at 1257. The determination of damages was a question for the jury. *Id.* The court does not find that the jury's award of compensatory damages was so excessive or speculative as to warrant reversal.

Defendants next argue that plaintiffs' claim for damages should have been limited to three years in Kennett Square, and the remaining seven in Cochranville since this was all that Ford could have conceivably promised. Plaintiffs' testimony on this issue was extremely inconsistent. However, Smith, de la Rigaudiere and Mrs. Tunis did testify that no mention of the move to Cochranville was made at the March 3, 1981 meeting with Nickel and Crawford. Plaintiffs were subject to extensive cross-examination on this point. The jury simply believed plaintiffs' testimony that after the March 3 meeting they were not required to move under any specific timetable. This was a quintessential question of fact to be determined by the jury. The court will not disturb it.

Lastly, defendants claim that the jury's award of punitive damages was not supported by the evidence and was grossly excessive in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Much of the delay in the disposition of this case was due to the volatility of this issue in cases before the

Supreme Court. Although the Supreme Court has yet to resolve the punitive damages question definitely, *see Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537 (1989) *cert. granted*, 110 S.Ct. 1780 (1990), this court could delay no longer. Consequently, defendants' argument that the punitive damages in this case were unconstitutional will be denied based on the Supreme Court's decision in *Browning-Ferris Ind. v. Kelco Disposal Inc.*, ____ U.S. ____, 109 S.Ct. 2909 (1989). Furthermore, whether defendants' fraud was so outrageous as to warrant punitive damages was a question of fact for the jury. *Delahanty, supra*, 464 A.2d at 1265-66. The court believes that the jury's finding of outrageous conduct was sufficiently supported by the evidence.

III. Conclusion

For the reasons stated above, defendants' motions will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC.	:	CIVIL ACTION
	:	
v.	:	FILED SEP. 27, 1990
	:	
FORD MOTOR COMPANY, FORD	:	
MOTOR CREDIT COMPANY, and	:	
WENNER FORD TRACTOR, INC.	:	NO. 82-5557

ORDER

AND NOW, TO WIT, this 26th day of September, 1990, in consideration of defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur, and plaintiff's response thereto, IT IS ORDERED that defendants' motions are *denied.*

An Opinion will follow within thirty (30) days of the date of this Order.

/s/
LOUIS C. BECHTLE, *Ch.J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC., et al.	:	CIVIL ACTION
v.	:	FILED FEB, 2 1989
FORD MOTOR COMPANY, et al.	:	NO. 82-5557

CIVIL JUDGMENT

Before Hon. Louis C. Bechtle

AND NOW, this 2nd day of February 1989, in accordance with the interrogatories submitted to the jury and answers thereto,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the plaintiff, Tunis Brothers Company, Inc. as follows:

On Count 4, Ford Motor Company, Ford Motor Credit Co. and Wenner Ford Tractor, Inc. are jointly and severally liable in the amount of $682,816.50. (Jury answer to interrogatory #2 is tripled)

On Count 5, Ford Motor Company is liable for punitive damages in the amount of $2,800,000. Ford Motor Credit Co. is liable for punitive damages in the amount of $1,200,000.

BY THE COURT:

ATTEST: /s/
Deputy Clerk

Entered: 2-3-89
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC., et al.	:	CIVIL ACTION
	:	
v.	:	FILED MAY 11, 1989
	:	
FORD MOTOR COMPANY, et al	:	NO. 82-5557

ORDER

AND NOW, TO WIT, this 11th day of May, 1989, in consideration of plaintiffs' motion pursuant to Fed.R.Civ.P. 59(e) to alter or amend the judgment entered by the court on February 3, 1989, IT IS ORDERED that plaintiffs' motion to amend the judgment to include prejudgment interest is *denied,* and plaintiffs' motion to amend the judgment on Count 5 is *granted.* Count 5 shall be amended as follows to reflect the verdict of the jury in response to Interrogatory #4. Judgment on Count 5 is *entered* in favor of plaintiffs and against defendant Ford Motor Company in the amount of $159,323.85. Judgment on Count 5 is *entered* in favor of the plaintiffs and against defendant Ford Motor Credit Company in the amount of $68,281.65.

/s/ LOUIS C. BECHTLE, J.

Entered: May 12, 1989
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER FORD TRACTOR, INC.
WENNER, JOHN S.
WATSON, JOHN
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E. S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C. W.

Appellees

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D. C. Civ. No. 82-5557)

(Argued: Tuesday, January 15, 1985)
Before: HUNTER and HIGGINBOTHAM,
Circuit Judges, and
DEBEVOISE, *District Judge**

(Filed: May 30, 1985)

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*Honorable Dickinson R. Debevoise, United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*:

The plaintiffs in this "distributor termination" case, a franchised tractor dealership and its new owners, appeal a final order of the district court granting summary judgment in favor of the defendant, franchisor and other corporate and individual defendants on plaintiffs' federal antitrust claims. The appealed from order also dismissed plaintiffs' state common law breach of contract and tort claims without prejudice.

We reverse and remand for further proceedings.

I. THE SUMMARY JUDGMENT RECORD

A. The Complaint and Other Pleadings

The six-count complaint filed by plaintiffs Tunis Brothers Company, Inc. ("Tunis Brothers"), Richard N. de la Rigaudiere ("de la Rigaudiere") and David C. Smith ("Smith")[1] on December 15, 1982 and amended July 14, 1983, includes four counts alleging violations of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982)[2]

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1. The use of the term "plaintiffs" in the plural will denote all three plaintiffs collectively. When the reference is to a single plaintiff it will be so specified.

2. Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . " Plaintiffs' claims brought under sections 7 and 14 of the Clayton Act, 15 U.S.C. §§ 18, 24 (1982), were dismissed by the district court's order dated June 22, 1983 granting in part and denying in part defendants' motions to dismiss. Tunis Bros. Co. v. Ford Motor Co., No. 82-5557 (E.D. Pa. June 22, 1983).

by three corporate defendants and eight individual defendants. The remaining two counts allege state common law tort and contract claims against the defendants and invoke pendent jurisdiction. The plaintiffs claim injuries to their business and property in the amount of $7,724,357 and seek treble damages from the defendants in the amount of $23,173,071. Appendix ("App.") at 11-94.

Count I alleges, *inter alia*, that corporate defendants Ford Motor Company ("Ford"), Ford Credit Company ("Ford Credit"), Wenner Ford Tractor, Inc. ("Wenner Ford"), and individual defendant John S. Wenner ("Wenner") conspired to terminate the authorized Ford tractor dealership of plaintiff Tunis Brothers, a Pennsylvania corporation located in Kennett Square, Pennsylvania. Complaint ¶ 66, App. at 35.

The business of Tunis Brothers had been established in 1934 by Richard M. Tunis and his brother Robert. In 1959, Tunis Brothers entered into an agreement with Ford[3] and became a franchised tractor dealership owned and operated by Richard Tunis and his wife Isabelle. From 1959 until April 1981 when its Ford dealership franchise was terminated, Tunis Brothers was an authorized dealer of Ford tractors and related equipment and it sold Ford tractors, Ford accessories and non-Ford products.[4] On

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3. The most recent franchise agreement between Ford, Ford Tractor Operations and Tunis Brothers is dated May 1, 1974 and is a "Dealer Sales and Service Agreement." Plaintiffs' Exhibit No. 1; App. at 2712. This franchise agreement remained in effect and governed the parties' relationship from 1974 to 1981.

4. Tunis Brothers was the only farm and industrial tractor dealer in Kennett Square, the "Mushroom Capital of the World." Complaint ¶ 28, App. at 21.

March 13, 1981,[5] plaintiffs de la Rigaudiere and Smith purchased the business and became the sole directors and stockholders of Tunis Brothers Company, Inc.

Count I further alleges that the defendants conspired to prevent plaintiffs de la Rigaudiere and Smith, the new owners of Tunis Brothers, from operating in Kennett Square to eliminate or substantially decrease competition with defendant Wenner Ford Tractor, Inc. Complaint ¶ 66, App. at 35-6.

Wenner Ford is a Delaware Corporation whose principal place of business prior to 1982 was Concordville, Pennsylvania, about 11 miles east of Kennett Square. Wenner Ford was the authorized Ford dealer of farm and industrial tractors, machinery, equipment and parts nearest Tunis Brothers. It is a Ford Dealer Development Company, established by Ford in November 1979, in which defendant Ford owns all of the voting stock and 79% of the equity stock. App. at 3522-37. Defendant John S. Wenner owned 21% of Wenner Ford's equity stock, app. at 3712-3883, and operated Wenner Ford as its president and chief executive officer pursuant to a Dealer Development Agreement and a Management Agreement.[6]
App. at 3434, 3449.

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5. There is a discrepancy in the date of purchase as alleged in the complaint at ¶ 6 which states "March 13, 1981" and as alleged in ¶ 51 which states "March 31, 1981". App. at 13, 29. The district court found that the date was March 13, 1981. Tunis Bros. Co. v. Ford Motor Co., 587 F. Supp. 267, 269 (E.D. Pa. 1984).

6. Ford's Dealer Development Program permits Ford and another party to invest in a dealership with the understanding that the other party will buy out Ford's investment within a reasonable time and become a private dealer. The terms of the agreement in this case included a provision that Ford would

It is alleged in Count 1 that, in addition to John S. Wenner, the other named individual defendants, employed by Ford in varying managerial capacities, participated in and aided and abetted the conspiracy. These individuals are: John Watson ("Watson"); Douglas N. Crawford ("Crawford"); Eugene W. Fraher ("Fraher"); E.S. Hasel ("Hasel"); Hugh Nickel ("Nickel"); Kenneth E. Harris ("Harris") and C.W. Wenzel ("Wenzel").[7]

It is further averred in Count 1 that the conspiracy and actions of the defendants were not only in unreasonable restraint of trade but were *illegal per se* because they were in furtherance of an illegal *horizontal territorial restriction* by Ford where Ford was in both a horizontal and a vertical relationship with Tunis Brothers, as both franchisor and competitor. Complaint ¶ 74, App. at 38.

Count II alleges that the 1974 franchise agreement between Ford and Richard and Isabelle Tunis constituted a contract in unreasonable restraint of trade due to the existence of certain unlawful provisions. The individual defendants are alleged to have aided and abetted Ford in exercising its rights under the agreement in furtherance of illegal objectives. Complaint ¶ 95, App. at 48.

Count III alleges, *inter alia*, that the franchise agreement and the conspiracy included "dirty business tricks and unfair business dealing . . . in furtherance of defendants' illegal antitrust objectives and their unreasonable restraint of trade . . ." Complaint ¶ 97, App. at 49.

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be the sole preferred stock shareholder of Wenner Ford and that John Wenner would be the sole common stock shareholder. *See* App. at 3464-71.

7. The district court granted defendant C.W. Wenzel's motion to dismiss all claims against him personally. Tunis Bros. Co. v. Ford Motor Co., No. 82-5557 (E.D. Pa. 1983).

Count IV avers that the franchise agreement and the conspiracy, by eliminating Tunis Brothers as a competitor, eliminated intrabrand competition in the sale and service of Ford products. Because no inter-brand competition of any significance or consequence was promoted by such elimination of intrabrand competition, it is alleged that the anti-competitive effect constituted an unreasonable restraint of trade. Complaint ¶ 100, 102; App. at 50, 51.

As to the state causes of action, Count V alleges tort liability under common law based on fraud and other tortious conduct. App. at 52-9. Count VI alleges contract liability on the part of the defendants at common law. App. at 60-5.

The defendants' answers and amended answers to the amended complaint deny all material allegations.[8]

B. Defendants' Rule 56 Motions

On November 30, 1983, the defendants filed motions for summary judgment pursuant to Rule 56 [9] of the Federal Rules of Civil Procedure, with supporting

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8. *See* Ford Motor Company's Amended Answer to Plaintiffs' Amended Complaint, August 18, 1983, App. at 94; Ford Motor Credit Company's Answer to Plaintiffs' Amended Complaint, August 1, 1983, App. at 130; Amended Answer of John Watson, Douglas N. Crawford, Eugene C. Fraher, E.S. Hasel, Hugh Nickel and Kenneth E. Harris to Plaintiffs' Amended Complaint, August 18, 1983; App. at 112; Answer and Counterclaim of Defendants Wenner Ford Tractor, Inc. and John S. Wenner, App. at 139.

9. Rule 56(c) provides that summary judgment shall be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
Fed. R. Civ. P. 56(c).

memoranda, affidavits, depositions and exhibits. App. at 200-900. The major argument presented by defendants was that there were no genuine issues of material fact in dispute and, on the basis of the undisputed facts, the plaintiffs not only failed to show direct evidence of a conspiracy but also failed to present facts which would permit a reasonable inference of conspiracy. Moreover, defendants argued that plaintiffs presented no facts showing an adverse impact on competition. They also asserted that there were no facts supporting plaintiffs' breach of contract claim.

In reply, the plaintiffs filed memoranda, affidavits, depositions and exhibits in opposition to defendants' summary judgment motions. App. at 900-1375. They argued in a 141-page brief that the factual record fully supported the allegations in the complaint and that there were genuine issues of material fact in dispute. The district court heard oral argument on February 8, 1984. App. at 1375.

In its May 7, 1984 memorandum opinion, the district court found that the plaintiffs failed to establish a ". . . contract or conspiracy, in restraint of trade" under section 1 of the Sherman Act in two respects.

First, the district court held that plaintiffs did not satisfy their burden of producing sufficient evidence of a conspiracy to terminate Tunis Brothers and to prevent de la Rigaudiere and Smith from operating the dealership as a franchise in competition with Wenner Ford. According to the district court, "there is no evidence of a conspiracy under section 1 of the Sherman Act" and therefore, "there is no genuine issue of material fact and all defendants are entitled to judgment as a matter of law on Counts I, III, and IV". *Tunis Brothers Co. v. Ford Motor Co.*, 587 F. Supp. 267, 274 (E.D. Pa. 1984).

Second, the district court determined that the 1974 franchise agreement, which contained provisions preventing Tunis Brothers from transferring the franchise without the approval of Ford and which gave Ford the right to terminate the agreement, was not a contract in unreasonable restraint of trade violative of section 1 of the Sherman Act. The district court also determined that "there are no facts which show that Ford improperly used the franchise agreement to deny transfer of the Ford franchise to plaintiffs de la Rigaudiere and Smith." *Tunis Brothers Co.*, 587 F. Supp. at 275. Summary judgment as to Count II was also granted.

Having dismissed all of the federal claims before trial, the district court then exercised its discretion and dismissed the pendent claims in Counts V and VI. 587 F. Supp. at 275.

The plaintiffs noticed this appeal on June 4, 1984.

II. STANDARD OF REVIEW

Although Tunis Brothers, de la Rigaudiere and Smith challenge the distict court's ruling as to the validity of the franchise agreement and the dismissal of the state claims, they have launched their major offensive against the district court's holding with respect to the entry of summary judgment on the conspiracy charge.[10] They strongly take issue with the district court's evaluation of the material facts and staunchly maintain that it failed to examine *all* of the admissible evidence, direct and circumstantial, which

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10. Specifically, plaintiffs argue first and foremost that the district court erred in holding that there is no evidence of a conspiracy under section 1 of the Sherman Act. Second, they argue that the district court erred in holding that the franchise agreement does not violate section 1 of the Sherman Act. Finally, they argue that the district court abused its discretion in dismissing the pendent state law claims.

they presented in opposition to the defendants' Rule 56 motions. The plaintiffs contend that the district court did not properly determine *what* legitimate inferences could be drawn as to the ultimate facts in issue.[11] They assail the trial court's conclusions by asking: Where are the facts?

Of course, in the true nature of our adversarial process, each side has provided us with a portrayal of the evidence which, if selectively read, could be viewed as providing a solid foundation of evidentiary support. Our function on appeal, however, in regard to summary judgment, is the same as that of a trial court: it is not within our province to adjudicate genuine factual issues. We are to view the evidence in the light most favorable to the plaintiffs, the nonmoving parties, giving Tunis Brothers, de la Riguadiere and Smith the benefit of all reasonable inferences without assessing credibility.

To determine whether the defendants have satisfied their burden under Rule 56, we must on the one hand closely scrutinize the affidavits, depositions, and exhibits submitted by the defendants, while on the other, indulgently treat those proffered by plaintiffs. 6 J. Moore, W. Taggert & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1985). Only if we conclude that the evidence is so one-sided that it leaves no room for any reasonable difference of opinion as to any material fact should we hold that the case should have been decided by the district court as a matter of law rather than submitted to a jury.

Although we recognize that summary judgments are somewhat disfavored in antitrust cases, especially

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11. Even if there is no dispute as to evidentiary facts, summary judgment is inappropriate if there is a dispute as to conclusions to be drawn from the facts. Magill v. Gulf & Western Industries, 736 F.2d 976 (4th Cir. 1984).

when motive or intent is at issue, *see Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 165 (3d Cir. 1979), they are not automatically precluded in antitrust litigation, if otherwise justified. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968); *Sound Ship Building v. Bethlehem Steel Co.*, 533 F.2d 96, 99-100 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976); *Innovation Data Processing, Inc. v. International Business Machines Corp.*, 585 F. Supp. 1470, 1472 (D.N.J. 1984). Therefore, we have, with painstaking care, reviewed this massive 3,712 page record to ascertain whether it does or does not have the quantum of evidence required to sustain the district court's grant of summary judgment on behalf of the defendants as to Counts I through IV. The critical inquiry is: did the district court err in concluding that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law? *Cernuto*, 595 F.2d at 165.

We believe that, in evaluating the evidence contained in this veritable mountain of briefs and appendices, the trial judge, unintentionally of course, tilted the scale *against* plaintiffs by failing to factor into the overall conspiracy equation certain significant evidence that clearly favored the plaintiffs. Therefore, we reverse the entry of summary judgment as to Counts I, III and IV. As to Count II, we also reverse the judgment of the district court, again for the reason that evidence favoring the plaintiffs was not taken into account as to the improper use of the franchise agreement.

Our review of the dismissal of plaintiffs' pendent state claims is for an abuse of discretion. In light of our disposition of the federal claims, we reinstate Counts V and VI and remand this matter for trial.

III. ANALYSIS

A. The Antitrust Claims

For activities to constitute a section 1 violation, the following four elements must be present: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-2 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

Although the literal language of section 1 declares "every" contract, combination or conspiracy in restraint of trade to be illegal, it has been been construed to proscribe only those combinations that "unduly" restrain trade. *Cernuto*, 595 F.2d at 166.[12] Thus, unless the particular restraint falls within a category that has been judicially determined to be illegal *per se*, the legality of a restraint challenged under section 1 of the Sherman Act must be assessed under the "rule of reason" standard.

To demonstrate an antitrust violation under the "rule of reason," plaintiffs would have to show an actual anti-competitive impact on the sale of tractors in the relevant market area. Plaintiffs allege, and may be able to prove such harmful effects, but the district court did not reach the question of adverse impact, having determined that the first element of a section 1

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12. A "rule of reason" is applied: the test of illegality is whether the restraint imposed merely regulates competition or whether it is such as may suppress or even destroy competition. Board of Trade v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.).

claim was not satisfied.[13] Plaintiffs' claims, however, are not entirely grounded on the "rule of reason;" in Count 1, plaintiffs allege the *per se* illegality of the defendants' combination in the form of a horizontal territorial restriction.[14]

1. Counts I, III, IV -- Concerted Action

We will first consider whether the defendants met their burden of establishing that, as to the undisputed material facts, there could not have been a conspiracy as a matter of law either because (a) there was not sufficient evidence of concerted action or (b) even if there was such evidence, the acts complained of are not violative of the antitrust laws.

(a) Burden of Proof

We begin with the proposition that "liability under the antitrust laws [cannot] be measured by any rigid or

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13. As stated, in addition to showing the existence of a conspiracy or combination, plaintiffs must show an adverse impact on competition to prove a section 1 claim. The termination of a dealer or rejection of a dealer application, even if done unfairly, does not by itself establish injury to competition. Industrial Investment Development Corp. v. Mitsui and Company, 671 F.2d 876, 889-90 n.16 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983).

    Since the district court concluded that the plaintiffs did not satisfy the first element of a section 1 violation, it did not reach the question of whether there was an adverse impact. Thus, this issue will be remanded, along with the conspiracy issue, for further consideration and fact-finding.

14. *See* Justice Black's description of *per se* violations of the Sherman Act in Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958). Those activities requiring no proof of an actually harmful impact are horizontal and vertical price fixing, resale price maintenance, group boycotts, tying arrangements, and certain types of reciprocal dealing. *See* Cernuto, 595 F.2d at 166.

mechanical formula. . . ." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

To establish the existence of concerted action as a matter of fact, the plaintiff must submit evidence from which a jury could reasonably infer that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective", *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1471 (1984), quoting *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), or, in other words, "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement. . . ." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1243 (3d Cir. 1975).[15] Direct proof of an express agreement is not required. *Edward J. Sweeny & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

As we noted in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 (3d Cir. 1983), *cert. granted*, 53 U.S.L.W. 3697 (U.S. April 1, 1985)(No. 83-2004), "[b]ecause the concert of action which violates the antitrust laws will so rarely be the subject of direct evidence, the Supreme Court has permitted *broad latitude* with respect to what *inferences* are permissible from the totality of the circumstances." (Emphasis added). The Supreme Court stated in *American Tobacco Co.*, 328 U.S. at 809-10:

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15. Plaintiffs assert that the district court applied too constrained a version of this test in evaluating the evidence. The district court examined plaintiffs' allegations for evidence of a "meeting of the minds" only. Tunis Bros. Co. 587 F. Supp. at 271.

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in an exchange of words. (citations omitted).

Conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. *See Associated Press v. United States*, 326 U.S. 1, 12-13 (1945). Those who, with knowledge of the conspiracy, aid or assist in carrying out the purposes of the conspiracy make themselves parties thereto and are equally liable to or guilty with the original conspirators.[16]

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16. Co-conspirators need not be intimately familiar with each and every detail of the conspiracy. A conspirator need not know all the other conspirators, nor have direct contact with them, and evidence of such knowledge is not essential. Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Consolidated Packaging Corp., 575 F.2d 117, 127 (7th Cir. 1978); United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944). A plaintiff "need not show that the defendant participated in every transaction or even that he knew the

The primary facts upon which plaintiffs rely to support their allegation of conspiracy are these:

(1) Plaintiffs de la Rigaudiere's and Smith's conversations and communications with defendants Ford, John Watson and Eugene W. Fraher regarding the purchase of Tunis Brothers by de la Rigaudiere and Smith and their application for Ford franchise from April 1980 to January 1981
Complaint ¶ 35-45, App. at 23-27.

(2) Plaintiffs de la Rigaudiere's and Smith's conversations and communications with defendants

Eugene W. Fraher and Hugh Nickel regarding their franchise application
Complaint ¶ 46-56, App. at 27-32.

(3) The events surrounding the rejection of plaintiffs de la Riguadiere's and Smith's franchise application
Complaint ¶ 57-65, App. at 32-35.

The character and effect of an alleged conspiracy are determined only by analyzing the activities in question as a whole, *Continental Ore Co. v. Union Carbide*, 370 U.S. at 699. This court "need not affirmatively find that a conspiracy exists, but merely that there are factual questions concerning such a conspiracy in order to deny the motions for summary judgment." *American Dermatologists' Medical Group, Inc. v. Collagen Corp.*, 595 F. Supp. 79, 81 n.1 (N.D. Ill. 1984). Therefore, we will look to the affidavits, depositions, and exhibits to determine whether the

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identities of his alleged conspirators or the precise role which they played." United States v. Kates, 508 F.2d 308, 310 (3d Cir. 1975) (footnotes omitted).

facts alleged by plaintiffs are susceptible of an interpretation that might give rise to an inference of a conspiracy.

(1) Plaintiffs' Conversations and Communications With Defendants Ford, John Watson and Eugene W. Fraher Regarding the Purchase of Tunis Brothers and Ford Franchise April 1980 to January 1981.

The district court found, as a matter of undisputed fact, that in March 1980 plaintiffs de la Rigaudiere and Smith began negotiations with Mr. and Mrs. Tunis as to the sale of the dealership. They initiated a series of meetings and negotiations with Richard and Isabelle Tunis, extending over a period of months, culminating in an Agreement of Sale dated December 16, 1980. App. at 2787.

Richard de la Rigaudiere deposed that he contacted defendant John Watson, a Zone Manager for Ford's Tractor Operations for an area including Kennett Square and Concordville, in April of 1980 regarding the proposed sale. App. at 1554. He further testified that Watson suggested that they meet at Wenner Ford and then have lunch at the Concordville Inn, near Wenner Ford. App. at 1908-11. It is undisputed that on May 23, 1980, prior to the sale of the business, de la Rigaudiere and Smith met with defendant John Watson for the purpose of discussing the transfer of the Ford franchise to them once Richard and Isabelle Tunis sold the business. The parties met at Wenner Ford.

Meeting at Wenner Ford and Concordville Inn - May 23, 1980

De la Rigaudiere testified that Watson introduced him and Smith to John S. Wenner and took them on a tour of the Wenner Ford facility. App. at 1564-5; 1910-91.

It is undisputed that the May 23, 1980 meeting also included lunch at the Concordville Inn, during which de la Rigaudiere and Smith told Watson of their plans to purchase Tunis Brothers, expand the business and become franchised tractor dealers in Kennett Square. Defendant Watson indicated that Ford did not intend to have a franchised dealership selling tractors in Kennett Square after Tunis Brothers was sold but rather was interested in having a franchised dealership in the area, 15 miles west of Kennett Square.

De la Rigaudiere and Smith both testified that Watson also said that the Kennett Square area was to belong to Wenner Ford after Mr. Tunis retired or sold the business. App. at 1567-15; 1919; 2142, 2377. Watson denies making the statement.

De la Rigaudiere further testified that Wenner was seated nearby during lunch at the Concordville Inn and was "in an excellent position to overhear . . . our conversation." App. at 1916. Defendant Wenner testified that he remembered the meeting with Watson, de la Rigaudiere and Smith at Wenner Ford but that he had no recollection of having lunch at the Concordville Inn on that same day and no recollection of ever eating at the Concordville Inn. App. at 108-10. Plaintiffs' Exhibit P-8, an invoice to Wenner Ford which shows that John Wenner had been at the Concordville Inn on May 23, app. at 2778, contradicts the testimony of Wenner. Watson denied in his deposition knowing that Wenner was at the Concordville Inn.

Following the May 23rd meeting, defendant Watson, in his Ford New Dealer Prospecting Report wrote that the two men were very well qualified to represent Ford in the trade area--Oxford and Cochranville, Pennsylvania--not Kennett Square. App. at 2779-80.

Whether or not Wenner saw Watson, de la Rigaudiere and Smith at the Concordville Inn; whether

it was just a coincidence that Wenner was seated at an adjacent table or whether this was planned and prearranged, are disputed issues of material fact properly left for a jury. [17]

Meeting on June 13, 1980 with Defendant Eugene E. Fraher

Smith testified that he and de la Rigaudiere felt that Watson and Wenner had been collaborating and decided to "go over their heads." App. at 2143. It is undisputed that later, in June 1980, plaintiffs de la Rigaudiere and Smith met with Watson's superiors, defendant Eugene E. Fraher, who was then Northeastern District Manager of Ford Tractor Operations, and his associate, Edward Poole, in Cohoes, New York.

Smith and de la Rigaudiere did not know that Fraher was also then a Director and Senior Vice President of Wenner Ford Tractor and that he had served in those official capacities since November 1979. App. at 3723, 3735, 3757, 3781, 3790, 3813, 3820, 3828, 3833-34, 3482. De la Rigaudiere testified that Fraher did not mention that Ford had a stock interest in Wenner Ford, or that he was an officer of Wenner Ford. App. at 1936-37.

It is undisputed that Fraher confirmed Watson's report that Ford intended to realign its distributorship and eliminate the Kennett Square outlet. According to Smith, Fraher agreed with Watson that Kennett Square was going to be Wenner's territory. App. at 2146. De la Rigaudiere testified to the same effect. App. at 1936.

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17. Summary judgment is inappropriate if an issue depends upon the credibility of witnesses, because credibility can best be determined only after the trier of fact observes the witnesses' demeanor. Magill v. Gulf & Western Industries, 736 F.2d 976, 979 (4th Cir. 1984).

De la Rigaudiere testified that Fraher also told them Ford preferred not to have its dealers competing with each other but went on to say that he thought de la Rigaudiere and Smith could have a dealership in Kennett Square for two to three years before they would have to move to the Cochranville area. App. at 1579-80, 1935-36, 1939-40. Smith testified, "Finally, we reached an agreement that we would start out in Kennett Square and after a period of time set up a place in Cochranville." App. at 2149. Fraher gave de la Rigaudiere and Smith dealer applications and told them to apprise him of the progress of the sale negotiations. App. at 1940.[18] After mortgage financing had been arranged through the Chester County Industrial Development Authority ("CCIDA"), App. at 2790, 3051, Richard and Isabelle Tunis and de la Rigaudiere and Smith signed an Agreement of Sale for Tunis Brothers. It is undisputed that performance of the agreement was not conditioned on de la Rigaudiere and Smith obtaining Ford's approval to continue the Tunis Brothers dealership as a Ford franchised dealership.

In January of 1981 de la Rigaudiere sent to Fraher de la Rigaudiere's and Smith's personal financial statements, a copy of the sales agreement, their

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18. By a letter dated September 29, 1980, de la Rigaudiere reported to Fraher on the progress of the purchase negotiations with the Tunis'. App. at 280. Fraher acknowledged receipt of the letter in his letter of October 15, 1980 which requested personal financial statements, the proposed agreement and the proposed plan of operation. The letter states: "[a]ny agreement you enter into should contain the stipulation the entire transaction depends on the approval of Ford. . . ." App. at 281. Plaintiff de la Rigaudiere testified that he did not think the stipulation was necessary because Fraher stated that would have the dealership in Kennett Square for two or three years. App. at 1943. In light of the assurances by Fraher, plaintiffs maintain that the stipulation was immaterial.

business plan, a description of the CCIDA and a copy of CCIDA approval. App. at 2857-58. The same package was mailed to defendant Douglas N. Crawford, who had succeeded Watson as Ford's zone manager. App. at 1666-67.

(2) Plaintiffs' Conversations and Communications With Defendant Hugh Nickel Regarding the Franchise Application

March 3, 1981 Meeting At Tunis Brothers

The district court found it to be an undisputed fact that on March 3, 1981, defendants Douglas N. Crawford and Hugh Nickel, a Dealer Replacement Representative in the Northern Region of Ford Tractor Operations, met de la Rigaudiere and Smith in Kennett Square to obtain more application information for: 1) a franchised dealership; and 2) credit from defendant Ford Credit As to this particular meeting, the district court made no further findings, nor did it consider record evidence and inferences in support of several important allegations made by plaintiffs. It is especially at this stage that the plaintiffs allege that the district court improperly tilted the scales against them by failing to note several critical facts and inferences favorable to plaintiffs that create a genuine dispute as to material facts within the admonitions of Rule 56.

De la Rigaudiere testified that he received a telephone call from defendant Crawford, who said that "Mr. Fraher was sending him." App. at 1668. Crawford testified that it was Mr. Fraher who telephoned him and told him to go to Tunis Brothers to take the dealer application. App. at 1292-94. Fraher testified that he did not call Crawford. App. at 1338-41.

During the meeting with de la Rigaudiere, Smith and Mr. and Mrs. Tunis, Nickel explained that Ford would not process an application for a replacement dealer unless the present dealer submitted a letter of

resignation. Nickel presented Mr. Tunis with a form letter of *unconditional* resignation and termination notice for Mr. Tunis to copy and submit to Ford. *Nickel told them Tunis' resignation letter would not be finally processed until the application of the new owners for Ford franchise was approved. Nickel assured them it would be approved and that the resignation and termination letter would be kept in a drawer and not acted upon.*

Nickel also recorded considerable detailed financial information which de la Rigaudiere and Smith supplied orally. He had de la Rigaudiere and Smith sign blank applications on which the credit information was to be typed later. He stated that he would have the forms typed up in his office and then return them to de la Rigaudiere and Smith for their review before submitting them. De la Rigaudiere and Smith never saw those papers again. App. at 1954-59. *See generally* deposition testimony of de la Rigaudiere, App. at 1950-54; Smith, App. at 2158-60; Isabelle Tunis, App. at 2661-63; Richard Tunis, App. at 2556-69.

During this meeting, neither Nickel nor Crawford mentioned any move to Cochranville or Oxford or any time limit on the franchise in Kennett Square. App. at 1959-62; 2162.

Despite his assurance to de la Rigaudiere and Smith that the dealer applications would be approved, Nickel subsequently wrote a Ford New Dealer Prospecting Report which stated that he did *not* feel that de la Rigaudiere and Smith were qualified businessmen or that their net worth or financial strength was adequate to qualify for a line of credit.

(3) *Rejection of Plaintiffs' Application*

According to de la Rigaudiere and Smith, after the March 3, 1981 meeting with Nickel and Crawford, the purchase and sale of Tunis Brothers was

consummated based on Nickel's repeated assurances that the dealership application of de la Rigaudiere and Smith would be approved. The closing of the sale of Tunis Brothers took place on March 13, 1981, and by letter dated March 17, 1981, Richard Tunis sent Ford his letter of resignation. App. at 2929. Upon receipt of Tunis' resignation, Nickel completed, by hand, a request that the Market Representation Manager accept Tunis' resignation *immediately*. App. at 2972, 1018. The request was then typed and signed by Fraher.[19] It is undisputed that defendant Kenneth E. Harris, the Market Representative Manager of the Northern Region of Ford Motor Company's Tractor Division, did not process the resignation letter, but rather, held the resignation pending a decision on plaintiffs' applications.

On April 1 1981, H. W. Stoneback, Manager of the Philadelphia Branch of Ford Credit, telephoned Harris and indicated that Ford Credit would not approve credit. Consequently, Harris called Ford to complete the resignation letter. In May 1981, de la Rigaudiere and Smith were informed that their credit application had not been approved by Ford Credit.

After de la Rigaudiere's and Smith's credit applications had been rejected, they discovered that Nickel had, in completing the dealer applications signed by them in blank, supplied information that de la Rigaudiere and Smith were investing in Tunis Brothers business only $2,500 each. Yet, they had informed Nickel at the March 3, 1981 meeting that they were putting $25,000 each into the business settlement. *See* deposition testimony of de la Rigaudiere, App. at 1959. Although Ford concedes that Nickel inserted the wrong figures, the district court

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19. Fraher signed the name of defendant E.S. Hasel, the Regional Manager, as Fraher was authorized to do. App. at 1019, 1343-44.

opinion does not address the blank applications or the erroneous information supplied. However, because the decision had been based on erroneous financial information, de la Rigaudiere and Smith were permitted to submit a new credit application to Ford Credit. App. at 3052-80.

Fraher opposed granting de la Rigaudiere and Smith a Ford dealership in Kennett Square and so advised defendant E. S. Hasel, Regional Manager of the Northern Region of Ford's Tractor Division *and* Senior Vice President and Director of Wenner Ford. Hasel notified de la Rigaudiere and Smith by letter dated August 7, 1981, that Ford would not approve their application for a franchised dealership in Kennett Square. App. at 3084. The district court does not discuss, although it acknowledges, this second rejection of de la Rigaudiere's and Smith's application. Subsequently, they became, and still are, an Allis-Chalmers dealership selling Allis-Chalmers tractors.

On the basis of the foregoing examination of the summary judgment record, we believe that there are numerous factual questions unresolved in this case. Issues of material fact need not be resolved conclusively in favor of the party opposing summary judgment; it is enough for the opposing party to show that sufficient evidence supporting some factual dispute requires a judge or jury at trial to resolve the parties' differing versions of the truth. *See Cedillo v. International Association of Bridge & Structural Iron Workers, Local Union No. 1*, 603 F.2d 7, 10-11 (7th Cir. 1979). The plaintiffs present a plausible, albeit somewhat complex and dramatic, view of the facts, but the inferences which the plaintiffs draw from the facts are not so far-fetched that a trier of fact should not be allowed to consider them. When viewed in the light most favorable to the plaintiffs, the facts are susceptible of an inference of concerted action.

However, we must still examine the *relationships* of the defendants in order to determine whether the alleged concerted conduct is violative of the antitrust laws.

(b) Liability of Co-conspirators

The character of an individual's relationship with a corporation in an intracorporate or intra-enterprise conspiracy situation is extremely significant if not determinative. Ford, Ford Credit, Wenner Ford, and John Wenner are the key corporate characters in this alleged conspiracy. The individuals who are or were employees of Ford, are denominated as "participants." The plaintiffs take the position that Ford and Wenner Ford conspired with each other and with all of the individual defendants, both employees and non-employees; that all of the individual defendants conspired with each other; and that Ford Credit conspired with Wenner Ford and with all of the individual defendants. The only change in position on appeal is that plaintiffs no longer contend that Ford conspired with Ford Credit, its wholly-owned subsidiary.[20]

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20. As we understand the alleged conspiratorial nature of the interrelationships, the breakdown is as follows:

Ford/Ford Credit
Ford/Individual Ford Employees
Ford/Wenner Ford
Wenner Ford/Ford Credit
Wenner Ford/Individual Ford Employees
Ford Credit/Individual Ford Employees
Individual Defendants/Individual Defendants

We note at the outset that plaintiffs have dispensed with their claim of conspiracy between Ford and Ford Credit. With respect to Ford/Ford Credit, the district court concluded that the facts do not justifiably permit an inference of a conspiracy between Ford Credit and Ford and thus Ford Credit could not be held liable as a co-conspirator under section 1 of the Sherman Act. Tunis Bros. Co. 587 F. Supp. at 272.

(1) Ford and Ford Employees, Including John Wenner; Wenner Ford and Wenner Ford Employees, Including John Wenner

Relying on our decision in *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981), the district court determined that individual Ford employees and John Wenner are incapable, as a matter of law, of conspiring with their respective corporations. Thus, the district court concluded that any acts between Ford and its employees or between Wenner Ford and John Wenner cannot be used to show that two or more persons or entities conspired to terminate Tunis Brothers or deny the transfer of the Ford franchise.

We do not disagree with the general proposition that officers and employees of a single firm are legally incapable of conspiring among themselves or with their firm in violation of section 1, *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984); *Tose*, 648 F.2d at 894.[21] But, this court has recently

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Even if plaintiffs established the existence of concerted action as a matter of fact, plaintiffs concede this point as a matter of law in view of the recent Supreme Court decision in Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984), in which the Supreme Court held that a parent and a wholly-owned subsidiary cannot be co-conspirators under section 1 of the Sherman Act due to complete unity of interest. Thus, the conduct is not violative of the antitrust laws. *Copperweld* does not, however, preclude a conspiratorial relationship between Ford and Wenner Ford since Wenner Ford is not wholly-owned.

21. A corporation can act only through its agents, thus the acts of corporate directors, officers and employees on behalf of the corporation are the acts of the corporation and a corporation cannot conspire with itself.

The district court noted that the rule prohibiting a conspiracy from being based on acts between a corporation and its

reaffirmed a recognized exception. If corporate officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employers for purposes of section 1. *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984). *See also Johnston v. Baker*, 445 F.2d 424, 426-27 (3d Cir. 1971); *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co. v. Daily Reflector,Inc.*, 496 F.2d 391, 399 (4th Cir. 1974).

Plaintiffs allege that defendants John S. Wenner, Eugene W. Fraher, Hugh Nickel, John Watson, Kenneth R. Harris, Douglas N. Crawford and E. S. Hasel conspired with their respective corporations and employers and fall within the exception to the general rule because each had an "independent personal stake" in achieving the allegedly illegal objective of their respective corporations and the conspiracy.[22]

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employees does not preclude a conspiracy predicated on acts by the employees and some non-employee or entity other than their own corporation. Thus, a conspiracy could be formed as to Ford and employees of Ford Credit or Wenner Ford.

Plaintiffs allege that a Ford employee, Nickel, not acting on behalf of Ford but on behalf of Wenner Ford, conspired with Ford Credit through Stonebeck. Plaintiffs rely, *inter alia*, on the telephone conversation between Stonebeck and Nickel during which they discussed the amount of capital that plaintiffs de la Rigaudiere and Smith were to invest. Therefore, we disagree with the district court's conclusion that the evidence is not sufficient to support an inference that a Ford employee, not acting on behalf of Ford, conspired with Ford Credit.

22. As to Ford and John Wenner, plaintiffs allege that John Wenner's "independent personal stake" was in achieving the elimination of Tunis Brothers as a competing Ford tractor dealer in Kennett Square through the termination of its franchise by Ford and the rejection, both by Ford and Ford Credit, of the applications for a new franchise and for wholesale credit by plaintiffs de la Rigaudiere and Smith.

As a general principle, questions of motive and intent are particularly inappropriate for summary adjudication. *Magill v. Gulf & Western Industries*, 736 F.2d 976, 979 (4th Cir. 1984) (summary judgment is seldom appropriate in cases where particular states of mind are decisive elements of claim or defense). Material fact issues exist as to the defendants' motives and because the factual issues of "personal stake" are unresolved, we hold that the district court could not properly determine, as a matter of law, whether the conduct of these employees fell within the general rule or the exception.

(2) Ford and Wenner Ford

An equally well-established tenet is that a conspiracy between corporations might arise if the directors, officers, representatives or other employees are working for two or more entities. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Since a corporation can only act through its officers and employees, the plaintiffs assert that Wenner Ford conspired with Ford through defendants Fraher and Hasel who were Senior Vice Presidents and Directors of Wenner Ford at various times while they were acting as management employees of Ford.

They allege an economic motivation given the fact that Wenner owned all of the common stock in Wenner Ford, representing 21% of its equity stock. The same rationale would apply to Wenner Ford and John Wenner.

As to Ford and the other individual Ford employees, plaintiffs allege that their personal motivation and stake was not monetary gain but the product of loyalty and allegience to John Wenner, a former Parts Operations Manager of Ford's Tractor Operations in Michigan before he acquired the privately-capitalized Ford franchise in which defendants Watson, Nickel and Fraher were closely involved when Wenner experienced a major financial crisis. The same motive is suggested as to Wenner Ford and individual Wenner Ford employees, Fraher and Hasel.)

The district court acknowledged that Fraher and Hasel served simultaneously as directors and officers of Ford and Wenner Ford. The court nonetheless determined that there were no facts which indicated that Fraher and Hasel, while working on behalf of Wenner Ford, attempted to terminate Tunis Brothers or prevent the transfer of the Ford franchise to de la Rigaudiere and Smith. We disagree. We believe that the plaintiffs have submitted evidence which could lead a jury to believe that the decision to terminate was *not* made *unilaterally* on the part of Ford.[23] We begin with the well-established rule that "a manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Service Corp.*, ___ U.S. ___, 104 S. Ct. 1464, 1469 (1984). A *unilateral* refusal to deal does not constitute an illegal contract, combination or conspiracy within the meaning of section 1 of the Sherman Act. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The Supreme Court in *Monsanto* recognized that there is, however, a crucial difference between accepted supplier actions such as pursuing market strategies, whereby a supplier seeks to compete with other manufacturers by imposing "reasonable" vertical restraints, and those actions of a supplier taken at the direction of its distributor. In the latter situation, the

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23. Defendants analyze the instant case as a *vertical restraint*, and stress that Ford's conduct was a lawful, unilateral decision.

The usual vertical restraint occurs due to vertical conflict -- conflict between the manufacturer's goals of improvement of its product or service's competitiveness and the subgoals of the distributor, such as individual profit maximization and independence. There is a *horizontal* conflict present in this case as well, however, between the subgoals of the two distributors, Wenner Ford and Tunis Brothers. We cannot ignore this obvious fact and its implications.

restraint becomes primarily horizontal in nature in that one distributor is seeking to suppress its competition by utilizing the power of a common supplier. "[T]he termination in such a situation is, itself, a vertical restraint[;] the desired impact is horizontal and on the dealer, not the manufacturer, level." *Cernuto*, 595 F.2d at 168. [24]

The tricky problem, of course, is that the case at bar is more akin to the latter situation -- it is neither a pure vertical refusal to deal nor a pure horizontal refusal to deal. The so-called "dealer complaint" cases involve a similar type of hybrid configuration and

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24. In those situations where the termination of a distributor has allegedly occurred due to a conspiracy between the supplier and one or more of its distributors, the courts have been uncertain as to whether to apply the "rule of reason" or the *per se* rule because, such cases have *both* horizontal and vertical elements.

If purely a horizontal restraint, it would be subject to scrutiny under the Sherman Act as illegal *per se*, *see, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966)(concerted refusal to deal), whereas if truly vertical, it could only be subject to the "rule of reason." *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

The dilemma has been described as follows:

> The actual termination of the distributor is imposed vertically by the supplier, yet the inducement for the termination may come horizontally from the complaining competitors of the terminated distributor. Thus, although the form of such a "mixed termination" conspiracy may be vertical, the competitive purpose and effect of the conspiracy is more similar to horizontal conspiracies that exclude competitors of the conspirators from a market.

Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297, 298 (1982). (footnote omitted)

provide the appropriate analytical analogy. These dealers usually allege that a refusal to deal, often manifested by their termination, was illegal because it was effectuated pursuant to an agreement among their supplier and one or more other distributors seeking to avoid competition with the terminated distributor. As evidence of such an illegal agreement, the distributor may cite other distributors' complaints to the supplier about the distributor's price-cutting, territorial incursion or other agressive competition.

The defendants seek to distinguish this action from these "mixed termination" or "dual distribution" cases by claiming that this matter does not rise to the level of a typical "dealer complaint" case because there is no evidence of any *complaints* to Ford by John Wenner or Wenner Ford. *See, e.g., Merican, Inc., v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 (10th Cir. 1985); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 105 S. Ct. 432-33 (1984). Nonetheless, we believe that this case could fall within the ambit of the dealer termination cases -- although granted it is not typical -- because the key element is not the complaint but simply probative evidence of some form of collusion between a supplier and a competiting distributor which interjects horizontal conflict.

In *Fragale & Sons Beverage Co. v. Dill*, Nos. 84-5614 and 84-5616 (3d Cir. April 15, 1985), we recently addressed the evidentiary burden an antitrust plaintiff in a refusal to deal situation must bear on summary judgment. Relying on *Monsanto*, a dealer termination case wherein the Supreme Court determined that in order to submit a section 1 claim to the jury, more than evidence of complaints from other distributors is needed, and also relying on our own

decision in *Sweeney*, we held that as part of the burden of establishing concerted action, the plaintiff must produce evidence that "tends to exclude the possibility that the [defendants] were acting independently." As we read *Fragale* and the authorities upon which it relies, the *initial* burden is not upon the plaintiff to *disprove* the likelihood of independent action, as the dissent suggests: the defendant must first prove the non-existence of a genuine issue of material fact. In this vein, we are also guided by Judge Wallace's cogent analysis in *Barnes v. Arden Mayfair, Inc.*, No. 84-3621 (9th Cir. April 15, 1985):

> We see no reason [not to] permit a defendant to meet its burden [of proving the non-existence of a material fact] by showing legitimate business reasons for its conduct. Once a defendant adequately explains its conduct, it is not unreasonable to require a plaintiff to put forth significant probative evidence, that is, evidence which is capable of sustaining an inference "that tends to exclude the possibility that the [defendant was] acting independently" and thus lawfully. (citations omitted).

Therefore, our inquiry is whether plaintiffs' allegations of conspiracy have been rebutted by probative evidence supporting an alternative interpretation of the defendants' conduct. If there is substantial factual evidence supporting *both* an inference of conspiracy *and* an inference of lawful conduct, and the crucial question involves motive, summary judgment is inappropriate. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968) (emphasis added); *see also Tose* 648 F.2d at 894-95 (evidence of motive must be weighed against business justifications put forth since court

must draw line between reasonable inferences for jury's consideration and "impermissible speculation.")

The plaintiffs make a compelling argument that Wenner Ford conspired with Ford through defendants Fraher and Hasel. They assert that the decision to terminate Tunis Brothers and the rejection of de la Rigaudiere's and Smith's applications for a new franchise and for wholesale credit was the result of *pressure from another franchisee*, Wenner Ford, as exerted by and through defendants Hasel and Fraher who were officers and directors of Wenner Ford.[25] The plaintiffs maintain that they have direct evidence that Hasel and Fraher made the decision for Ford to reject de la Rigaudiere's and Smith's application and to terminate Tunis Brothers. They rely on the following factors:

- In March 1981, Fraher first sent Nickel and Crawford to Tunis Brothers to secure an unconditional resignation from Mr. Tunis which Nickel told de la Rigaudiere and Smith would not be made effective until their dealership applications were approved.
- Without waiting for approval, Fraher immediately processed the resignation so that it became effective and Tunis Brothers was terminated on April 2, 1981.
- In March 1981 Fraher submitted de la Rigaudiere's and Smith's application to Ford Credit with inaccurate financial information which Nickel later verified to Ford Credit.
- After de la Rigaudiere and Smith discovered the inaccurate information on the application forms

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25. Whether Hasel and Fraher were "nominal" officers of Wenner Ford is a question of disputed fact. The power to vote is the power to destroy.

they signed in blank, and after they submitted *new* applications in July 1981 with accurate information, Fraher persuaded Hasel, who was then Senior Vice President of Wenner Ford as well as Regional Manager of Ford, to reject the application.

Was Nickel's understatement by 90 percent ($22,750) as to the amount of cash that de la Rigaudiere and Smith invested merely an inadvertent error, or was it an advertent effort to, in combination with Wenner and others, elminate Tunis Brothers as a competitor to Wenner Ford?

The difference between a reported $2,500 and the actual $25,000 cash downpayment has to be significant in the credit application and hence the dealership application. Was Nickel's misstatement that the credit application would be approved merely an optimistic forecast or was it part of a venal plan, in combination with Wenner Ford and others, to lull Tunis Brothers into prematurely terminating the franchise? Certainly the ultimate answer is one that should be given by the trier of facts and not decided in a summary judgment ruling.

In our view, this raises a disputed issue of material fact as to motive, intent and conflict of interest. Viewing the evidence in the light most favorable to the plaintiffs, we find that the evidence presented supports an inference that the close ties between defendants Hasel and Fraher and defendants Ford and Wenner Ford led to an illegal agreement, even if implicit. It is reasonable to infer that Fraher and Hasel were mindful of their corporate obligations as officers and directors of Wenner Ford when they considered the matter of Tunis Brothers in 1980 and 1981. Fraher and Hasel served "two masters" -- one Wenner Ford, the other Ford Motor Company. There is no reason why a jury must find that they made some of their Ford decisions

adverse to plaintiffs with an obliviousness to its advantages to Wenner Ford. He who wears two hats simultaneously should not be surprised if a jury wonders which hat he prefers. He should not be surprised if the jury concludes, by his actions, that he favors only one of the hats -- the one from the "Wenner Ford Haberdashery", for instance.

Defendants argue that even in "dealer complaint" cases, terminations and restrictions are entirely lawful so long as the manufacturer's actions of control over distributors were consistent with *market strategy* and there is no evidence that the manufacturer acted contrary to its market strategy for the benefit of its distributors or dealers. According to Ford, its marketing plans as early as the mid - 1970's contemplated the termination of the Kennett Square site as soon as Mr. Tunis retired or resigned. Ford also asserts that its decision on plaintiffs' application was guided by its perception of plaintiffs' financial soundness. From our reading of the record, however, this articulated business justification raises disputed issues of fact.[26] Furthermore, we cannot reconcile this

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26. The dissent refers to the "undisputed testimony" that Ford planned to combine Rising Sun, Maryland and Kennett Square, Pennsylvania dealerships into one dealership in either Oxford or Cochranville. Defendant Watson testified: "I just can't answer whether [the decision] was before 1974 or after or when it was made, but it had been made." App. at 490. The dissent refers to the "undisputed testimony" that Ford representatives informed the plaintiffs of this market strategy. Mr. Tunis testified that Watson "gave me every indication that as long as the new owners were financially responsible that there wouldn't be any problem about the transfer of the dealership to the new owners." App. at 2517. In response to counsel's question as to whether or not a Ford representative spoke to him about whether Ford was interested or not interested in continuing a dealership at Kennett Square, Mr. Tunis replied:

"plausible explanation" with the conduct of the defendants that fell short of "proper business practices." *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 672 (3d Cir. 1980). Are we to assume that the allegedly falsified credit applications of de la Riguadiere and Smith and the allegedly fraudulent inducement of Mr. Tunis to submit an unconditional resignation is conduct consistent with the implementation of a legitimate business purpose?

Also in support of their market strategy argument, the defendants rely on *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1199 (6th Cir. 1982), *cert. denied*, 104 S. Ct. 1718 (1984), *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1707 (1984) and *Battle v. Watson*, 712 F.2d 1238 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1718-19 (1984). We believe these cases are distinguishable.

At the outset, we note that in these "dealer complaint" cases, the complaining dealer was not a Dealer Development Company where the franchisor owned all of the voting stock and 79% of the equity stock. Thus, the franchisor itself in this case has a horizontal interest. Moreover, in the cases relied on by the defendants, the courts found no proof that dealer complaints were *causally related* to the manufacturer's decision to terminate.

A. He never said anything about that.

Q. He never said one way or the other?

A. Never said one way or the other.
It was never discussed.

. . .

Q. Did you ever discuss retirement without selling your business?

A. Never.

App. at 2518-19.

In *Davis-Watkins*, the exclusive distributor of microwave ovens brought an action against the retail merchandising firm and the court held that there was insufficient evidence that concerted action existed to support the general rule that non-price vertical restraints should be analyzed under the "rule of reason." The court stated that in determining whether non-price restraints are imposed vertically or horizontally, the focus of the inquiry must be on the *purpose and effect* of such restrictions. The court found no evidence that any of the distributors or dealers, by concerted action among themselves or by Amana, the supplier, refused to deal with the plaintiff. The court found no evidence that established that dealer coercion caused Amana to act other than consistently with its market strategy. The crux of the case was that the distributor had failed to submit evidence that Amana and the distributors had acted jointly. The evidence tendered consisted of complaints to Amana by its distributors and dealers concerning low prices and lack of service. It in no way established "unity of purpose or common design among distributors and dealers on a horizontal level." *Davis-Watkins*, 686 F.2d at 1199.

The *Davis-Watkins* court thus found that the distributor was attempting to enter Amana's distribution chain on a basis consistent with *its own marketing strategy* rather than the marketing strategy that Amana imposed upon its distributors and dealers. The court therefore determined that the manufacturer imposed restrictions based on its own independent business judgment.

In the present case, an inference of unity of purpose or common design arises initially from the fact that Fraher and Hasel were simultaneously acting on behalf of Wenner Ford, a competing dealer, and Ford, the franchisor.

Battle and *Roesch*, also relied upon by the defendants, present a situation similar to that posed in *Davis-Watkins*. However, the summary judgment of the district court in each instance was affirmed by an equally divided court sitting en banc, and thus, while instructive, these cases are lacking in precedential value. In any event, the two are distinguishable from this one. Both involved the case of a competing distributor which complained to the manufacturer but received a neutral response; later, the manufacturer made a unilateral decision to terminate the plaintiffs. In both cases, the court concluded that a manufacturer's termination after receiving complaints cannot be characterized *in and of itself* as responsive action permitting an inference of concerted action. *Battle*, 712 F.2d at 1240.

In all three of the above cases, the courts refused to infer concerted action from isolated dealer complaints in keeping with *Monsanto's* directive. However, the distinguishing feature of this case is that it does not involve isolated complaints but rather, two directors and officers of a competing dealer who are also management officials of the franchisor. In none of the cases relied upon by the defendants has there been this complicity of interrelationship between the franchisor and a franchisee competing with the plaintiff.

As to Ford's marketing strategy, we point to Judge Adams' reasoning in *Cernuto*, 595 F.2d at 168:

> "When a marketing decision, although ostensibly taken by a manufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be."

The import is clear: Once the manufacturer's refusal to deal is tainted with *duality of action*, as manifested by some "agreement", the *Colgate* defense of unilateral action is not applicable.

2. Count II -- Illegal Contract

We now turn to the question of whether the defendants met their burden of establishing that, as to the undisputed material facts, there could not have been a contract in restraint or trade because (a) the agreement was valid on its face and (b) there was not sufficient evidence that the agreement was used to further an illegal objective.

The district court held that the 1974 franchise agreement for the dealership did not, *on its face*, violate section 1 of the Sherman Act. We agree.

Count II alleges that the 1974 franchise agreement between Ford and Tunis Brothers constituted a contract in unreasonable restraint of trade. The purportedly unlawful provisions in the franchise agreement are 1) that the franchisee, Tunis Brothers, could not transfer the franchise without the franchisor Ford's approval; 2) Ford had the right to terminate the agreement without notice if there was a transfer or attempt to transfer any ownership interest in the dealership; and 3) Ford had the right to deny an application for a Ford franchise from any purchaser of the Tunis Brothers business.[27] According to plaintiffs, these contractual provisions made the agreement illegal both *per se* and under a "rule of reason" analysis.

We are inclined to accept the district court's reasoning as to the *per se* illegality of the clauses: a manufacturer is free to choose with whom he will deal absent any agreement restraining trade, *Colgate*, 250 U.S. 300; *Cernuto*, 595 F.2d 164, and a refusal to deal is not a violation unless it is the result of collusive action between two entities. In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967), the

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27. The plaintiffs challenge ¶ E, ¶ 14(b)(1), ¶ 15, and ¶ 14(e) of the franchise agreement.

Supreme Court discussed the permissible limits of franchisor control of franchisees:

> . . . if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

A district court opinion lends support:

> [T]here is certainly nothing unreasonable in requiring the consent of the franchisor to the assignment of the franchise. A franchisor has a perfect right to consider the character, stability, reputation, business ability, etc., of those to whom it will entrust its own goodname, its mark and its products. We see nothing invidious in a franchisor taking precautions against the indiscriminate use of its own reputation and the intrusion of perhaps unsavory strangers.

Seligson v. Plum Tree, Inc., 361 F. Supp. 748, 753 (E.D. Pa. 1973).

However, Count II also avers that Ford used the contractual provisions to reject plaintiffs de la Rigaudiere's and Smith's application to be franchised Ford dealers and to prevent a transfer of the Ford franchise and further avers that all of the named defendants aided and abetted Ford in exercising its rights under these provisions in furtherance of these illegal objectives. Complaint ¶ 94, 95; App. at 47, 48.

The district court determined that there are *no facts* which show that Ford improperly used the franchise agreement to deny transfer of the franchise to de la Rigaudiere and Smith.

We disagree. The plaintiffs suggest that Ford did more than simply assert its rights under the terms of

the clauses. They assert an unlawful use of the agreement -- the objects of, and the conduct engaged in pursuant to that contract were illegal. Their precise contention is as follows: "[the] franchise agreement and the acts, representations, statements and conduct and conspiracy of the defendants . . . [were] in furtherance of defendants' illegal antitrust objectives . . ." App. at 1068.

Under the "rule of reason" standard, there is a greater reluctance to uphold a grant of summary judgment where the conduct is to be examined for its reasonableness than where it is to be subjected to a *per se* rule. *See Harold Friedman, Inc. v. Thorofare Markets*, 587 F.2d 127 (3d Cir. 1978). While we do not accept the plaintiffs' urging to subject the provisons of the franchise agreement to a *per se* rule, we do agree that the reasonableness of Ford's alleged anticompetitive conduct can be determined only after the evidence adduced at trial is assessed. We reiterate: disputed issues of material fact as to motive, intent and conflict of interest permeate this record.

B. The Pendent Claims

1. Counts V and VI -- Tort and Breach of Contract

In view of the foregoing, we find that the entry of summary judgment on the federal antitrust claims was improper and therefore, the district court abused its discretion in dismissing plaintiffs' state common law breach of contract and tort claims.

IV.

Accordingly, the judgment of the district court will be reversed as to Counts I, II, III and IV. Counts V and VI will be reinstated and this case remanded for trial on all counts.

HUNTER, *Circuit Judge*, dissenting:

1. My disagreement with the majority opinion lies not with what the opinion recites, but with what the opinion omits. Because I believe that appellants have utterly failed to raise genuine issues of material fact to support a conspiracy in violation of section 1 of the Sherman Act, I respectfully dissent.

2. The majority opinion states, and I agree, that: "[t]o establish the existence of concerted action as a matter of fact, the plaintiff must submit evidence from which a jury could reasonably infer that the defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective . . . ." Maj. op. typescript at 15. The majority opinion fails, however, to complete its paraphrase of this court's opinion in *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 110-11 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), and the Supreme Court's opinion in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). Because this omission is critical to this case, the majority erred when it failed to complete the statement of the appellants' burden.

3. In *Monsanto*, the Court held that an antitrust plaintiff in a refusal to deal case must establish, either by direct or circumstantial evidence, that the defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective." 104 S. Ct. at 1471. As part of this burden, however, the Court stated that the antitrust plaintiff must produce evidence that "tends to exclude the possibility that the [defendants] were acting independently." *Id.*; *see Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In this regard, "[e]vidence of an opportunity to conspire, although relevant, is not enough to sustain an antitrust plaintiff's burden, and,

without more, does not create a jury question on the issue of concerted action." *Fragale & Sons Beverage Co. v. Dill*, Nos. 84-5615, 84-5616 (3d Cir. April 15, 1985).

4. By ignoring the necessity of disproving the likelihood of independent activity, the majority opinion allows appellants in this case to sidestep summary judgment on the basis of evidence, which, even if believed, would only establish that an opportunity to conspire existed. For example, the majority correctly finds that the only possible section 1 conspiracy claim in this case involved alleged concerted action between Ford Motor Company and those Ford employees who also served as nominal directors of Wenner Ford. The facts recited by the majority to support this allegation of conspiracy, however, establish at the very most only that defendants were in a position to conspire.[1] Further, by not focusing on the possibility of independent action by Ford Motor Company in denying appellants their desired tractor franchise, the majority misses the critical teaching of both *Monsanto* and *Sweeney*: "A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." 104 S. Ct. at 1469; *see Sweeney*, 637 F.2d at 110-11.

5. When the necessity that appellants must disprove the possibility of independent action is put into the case, as we submit it must, the undisputed facts are dispositive. These facts fully support Ford's

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1. The majority, for example, cites the following "material" facts: that Ford representatives met with appellants at Wenner Ford's dealership; that the meeting continued over lunch at the Concordville Inn; that defendant Wenner possibly overheard the meeting participants' conversation at lunch; and that the Ford Representatives told appellants that Ford did not want a tractor dealership in the locale that appellants desired. Maj. op., typescript at 19-20.

contention that it acted independently in denying appellants the tractor franchise in Kennett Square, Pennsylvania, and include: undisputed testimony that Ford, as part of a market strategy developed before Wenner Ford even existed, planned to combine its Rising Sun, Maryland and Kennett Square, Pennsylvania dealerships into one dealership in either Oxford or Cochranville, Pennsylvania (App. at 490-93, 2517-18); undisputed testimony that Ford representatives informed both the franchisee who sold to appellants and appellants themselves of this marketing strategy (App. at 491-92, 2517-18); undisputed evidence that Tunis Brothers had poor sales in recent years (App. at 503), and in fact averaged only nine tractors sold per year between 1978-80 (App. at 556); undisputed evidence that a declining market for tractors existed in the Kennett Square area (App. at 342-43, 361, 364); and, perhaps most importantly, undisputed evidence that appellants, although given an opportunity by Ford to obtain a franchise in Cochranville, never applied for the franchise (App. at 293-94, 1337).

6. I do not doubt that appellants are disappointed in Ford's decision not to award them a franchise in Kennett Square. Disappointment over a unilateral decision not to deal, however, does not provide a claim for relief under the Sherman Act. I would affirm the district court's order.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

A-140

SUPREME COURT OF THE UNITED STATES

No. 85-487

FORD MOTOR COMPANY, et al.,

Petitioners,

v.

TUNIS BROTHERS COMPANY, INC., et al.

ON WRIT OF CERTIORARI to the United States ɔurt of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the peti-ɔn for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered ıd adjudged by this Court that the judgment of the ɔove court in this cause is vacated with costs, and that ıis cause is remanded to the United States Court of ppeals for the Third Circuit for further consideration in ght of *Matsushita Electric Industrial Co., Ltd.* v. *enith Radio Corp.*, 475 U.S. (1986).

IT IS FURTHER ORDERED that the petitioners, ɔrd Motor Company, et al., recover from Tunis Broth-s Company, Inc., et al., Two Hundred Dollars ;200.00) for their costs herein expended.

April 7, 1987

lerk's costs: $200.00

A-141

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER FORD TRACTOR, INC.
WENNER, JOHN S.
WATSON, JOHN
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E.S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C.W.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Submitted Under Third Circuit Rule 12(6)
May 12, 1986
Assigned May 12, 1987

Before: HUNTER and HIGGINBOTHAM,
Circuit Judges, and DEBEVOISE,
*District Judge.**

(Opinion filed: July 15, 1987)

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*Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

This matter is before us on remand from the United States Supreme Court. In our first encounter with this appeal, *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985) ("*Tunis Brothers I*"), we reversed the district court's order granting summary judgment in favor of the appellees and remanded this matter for trial on all counts. On April 7, 1986, the United States Supreme Court vacated that judgment, remanding the matter to us for further consideration in light of *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ("*Matsushita*"). *Ford Motor Co. v. Tunis Bros. Co., Inc.*, ___ U.S. ___, 106 S. Ct. 1509 (1986). After considering supplemental briefs and memoranda filed by the parties,[1] we conclude that *Matsushita* does not require a new result. We will therefore again reverse the district court's order and remand all counts for trial.

I.

Matsushita addresses the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case. The plaintiff in such a case must produce evidence tending to show a conspiracy in violation of the antitrust laws and, in addition, tending to show injury to the plaintiff

1. After the Supreme Court remanded *Matsushita*, this Court issued its final opinion in that dispute. In re Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir. 1986). A petition for certiorari was subsequently filed, and we delayed deciding this appeal until that petition was denied on April 27, 1987. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., ___ U.S. ___, 107 S. Ct. 1955 (1987).

resulting from such illegal conduct. In general terms, according to *Matsushita*, the plaintiff's evidence must create more than "some metaphysical doubt as to the material facts." 475 U.S. at ___, 106 S. Ct. at 1356. If in the factual context of the case the plaintiff's claim is implausible -- that is, if the plaintiff's "story . . . does not make sense" as a matter of economic theory, 475 U.S. at ___ n.15, 106 S. Ct. at 1359 n.15; *accord In re Japanese Elec. Prods. Antitrust Litig.*, 807 F.2d 44, 47 (3d Cir. 1986) ("the Supreme Court deemed [the conspiracy alleged in *Matsushita*] economically senseless"), *cert. denied sub nom. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, ___ U.S. ___, 107 S. Ct. 1955 (1987); *Assam Drug Co., Inc. v. Miller Brewing Co.*, 798 F.2d 311, 317 (8th Cir. 1986) ("[t]he *Matsushita* Court noted the relevance of economic realities in evaluating summary judgment motions") -- then the plaintiff "must come forward with more persuasive evidence to support the[] claim than would otherwise be necessary." 475 U.S. at ___, 106 S. Ct. at 1356.

Of particular relevance to this appeal is the *Matsushita* Court's statement that, if the antitrust defendant's conduct is consistent both with permissible competition and with illegal conspiracy, evidence of such conduct "does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at ___, 106 S. Ct. at 1357. In such a situation, "[t]o survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of [Sherman Act] § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). In other words, such a plaintiff "must show that the inference of [illegal] conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff]". *Id.*

II.

Applying *Matsushita*'s summary judgment principles to this record,[2] it can -- if one carefully prunes the record to uncover select facts contained therein -- be said that Ford's termination of the Tunis Ford tractor dealership is as consistent with an inference of permissible independent action by Ford Motor Company as it is with an inference of illegal conspiracy involving Ford. The evidence can be interpreted as disclosing a legitimate plan by Ford to rationalize its tractor distributor network by eliminating Tunis, or the evidence can be interpreted as disclosing a vertical conspiracy between Ford and the Wenner Ford dealership to eliminate Tunis as a Wenner Ford competitor. Given this situation, in which the appellees' challenged conduct is as consistent with permissible competition as it is with illegal conspiracy, *Matsushita* teaches that it is appellants' burden at the summary judgment stage to produce evidence that tends to exclude the possibility that Ford acted independently and thus to show that an inference of illegal conspiracy is reasonable in light of the competing inference of independent action.

The evidence adduced by appellants to satisfy this burden is substantial but not overwhelming; we conclude that it meets *Matsushita*'s requirements. *Cf. Marsann Co. v. Brammall, Inc.*, 788 F.2d 611, 613 n.1 (9th Cir. 1986) ("*Matsushita* . . . discusses only the amount of evidence required to allow a factfinder to infer the existence of a conspiracy punishable under section 1 of the Sherman Act"). Instead of simply

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2. Because our initial opinion sets forth the facts of this case in great detail, *see Tunis Brothers I*, 763 F.2d at 1485-87, 1491-97, 1499, 1501, we see no need to repeat the record here. We do, however, readopt all aspects of that opinion's factual summary and analysis that are not inconsistent with this opinion.

terminating the Tunis dealership in a straightforward manner in order to streamline its dealership structure, there is substantial evidence from which it can be inferred that Ford, acting with Wenner Ford Tractor, Inc., engaged in trickery and chicanery in order to eliminate Tunis as a competitor of Wenner Ford. The evidence shows that Ford had a substantial financial interest in Wenner Ford. It also shows that two Ford employees, appellees Fraher and Hasel, served as directors and officers of Wenner Ford. In addition, there is evidence from which one may conclude that Ford employees tricked Tunis into resigning and caused de la Rigaudiere's and Smith's application for the Kennett Square Ford tractor dealership to be rejected due to false financial information that Fraher had inserted into their dealership application. When we consider, as we must, the record as a whole, appellants' evidence tends to exclude the possibility that Ford acted independently, and it shows that an inference of illegal conspiracy between Ford and Wenner Ford is reasonable. This is, in other words, a case where the "antitrust plaintiff[s] raise[] genuine issues of fact as to the existence of a common scheme or commitment, and the unlikelihood of independent action on the part of the defendants[. T]he issue of whether the defendants unlawfully conspired [therefore] belongs with the jury." *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985). The legal analysis of our initial opinion was consistent with the requirements of *Matsushita*.

III.

For the foregoing reasons, the judgment of the district court as to Counts I, II, III and IV will be reversed. Counts V and VI will be reinstated, and this case will be remanded for trial on all counts.

Hunter, *Circuit Judge, Dissenting*:

1. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court concluded that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." 475 U.S. 574, ___, 106 S. Ct. 1348, 1357 (1986) (citations omitted). *Matsushita* is consistent with the Supreme Court's other recent decisions clarifying the proper standards for deciding summary judgment motions. While summary judgment cannot be granted if any genuine issue of material fact remains for trial, it is now clear that no such genuine issue of material fact remains "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby*, ___ U.S. ___, ___, 106 S. Ct. 2505, 2511 (1986). Therefore, when ruling on a summary judgment motion, a judge must "view the evidence presented through the prism of the substantive evidentiary burden" that the parties must bear at trial. *Id.* at ___, 106 S. Ct. at 2513. If "the nonmovant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987) (*in banc*) (citations omitted). The Supreme Court has expressly told this court to reevaluate its denial of summary judgment to the defendants in this case in light of *Matsushita*. Because I believe that the majority has again failed to apply the

proper legal standards to the facts of this case, I respectfully dissent.

2. The facts referred to by the majority -- Ford's financial interest in Wenner Ford and the fact that two Ford employees served as nominal directors of Wenner Ford -- do not establish the existence of an antitrust conspiracy. These facts establish, at most, the opportunity to conspire, which "although relevant, is not enough to sustain an antitrust plaintiff's burden, and, without more, does not create a jury question on the issue of concerted action." *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 473 (3d Cir. 1985). The rest of the evidence relied upon by the majority to deny defendants' motion does not demonstrate a conspiratorial refusal to deal on the part of defendants, although it may well show a completely permissible unilateral refusal to deal. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."). The undisputed facts fully support Ford's contention that it acted independently in denying appellants the tractor franchise in Kennett Square, Pennsylvania. Those facts demonstrate a long-standing marketing strategy on the part of Ford to move its Kennett Square dealership to another part of Pennsylvania. That marketing strategy was developed in response to the consistently poor showing in tractor sales by Tunis Brothers, as well as the generally declining market in tractor sales throughout the Kennett Square area. Ford's decision to leave Kennett Square was economically rational and non-conspiratorial.

3. I would affirm the judgment of the district court granting summary judgment to the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

No. 87-745. FORD MOTOR CO. ET AL. *v.* TUNIS BROTHERS CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 823 F. 2d 49.

484 U.S. 1060, 98 L.Ed.2d 979

FORD MOTOR COMPANY, et al., petitioners, v. TUNIS BROTHERS COMPANY, INC., et al. No. 87-745.

Former decision, 475 U.S. 1105, 106 S.Ct. 1509.

Case below, 587 F.Supp. 267; 763 F.2d 1482; 823 F.2d 49.

Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Feb. 22, 1988. Denied.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

SALLY MRVOS
CLERK

TELEPHONE
215-597-2995

FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

February 11, 1992

Re: Tunis Bros., et al. vs. Ford Motor Co., et al.
Nos. 90-1797 and 90-1816

Dear Counsel:

Enclosed herewith is conformed copy of Order filed today in the above-entitled case.

Very truly yours,
Sally Mrvos, Clerk

By:_____
Barbara Jacobson
Deputy Clerk
Direct Dial 597-8465

bj
enc
cc: R. C. Heim, Esq.
S. T. Stern, Esq.
A. R. Ginsburg, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1797 and 90-1816

TUNIS BROTHERS COMPANY, INC.;
RICHARD N. DE LA RIGAUDIERE, and
DAVID C. SMITH,

vs.

FORD MOTOR COMPANY; FORD MOTOR CREDIT
COMPANY; WENNER FORD TRACTOR, INC.;
JOHN S. WENNER; JOHN WATSON;
DOUGLAS N. CRAWFORD; EUGENE W. FRAHER;
E. S. HASEL; HUGH NICKEL;
KENNETH E. HARRIS; C. W. WENZEL

FORD WENNER COMPANY, FORD MOTOR
CREDIT COMPANY, and WENNER FORD
TRACTOR, INC.,
Appellants in No. 90-1797

TUNIS BROTHERS COMPANY, INC.;
RICHARD N. DE LA RIGAUDIERE; and
DAVID C. SMITH,
Appellants in No. 90-1816

vs.

FORD MOTOR COMPANY, FORD MOTOR CREDIT
COMPANY; WENNER FORD TRACTOR, INC.;
JOHN S. WENNER; JOHN WATSON;
DOUGLAS N. CRAWFORD; EUGENE W. FRAHER;
E. S. HASEL; HUGH NICKEL;
KENNETH E. HARRIS; C. W. WENZEL

SUR PETITION FOR REHEARING

Present: BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, *Circuit Judges.*

The petition for rehearing filed by appellees/cross appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

FEB 11 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER FORD TRACTOR, INC.
WENNER, JOHN S.
WATSON, JOHN
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E. S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C. W.

Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*, and DEBEVOISE, *District Judge*.*

* Honorable Dickinson R. Debevoise, United States District Court for District of New Jersey, sitting by designation.

The petition for rehearing filed by defendants/appellees Ford Motor Company, Ford Motor Credit Company, Wenner Ford Tractor, Inc., John S. Wenner, John Watson, Douglas N. Crawford, Eugene W. Fraher, E. S. Hasel, Hugh Nickel, and Kenneth E. Harris, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Hunter would grant rehearing for the reasons expressed in his dissent, Judge Weis would grant rehearing, and Judge Garth would grant Ford Motor Company's petition for rehearing.

BY THE COURT,

_____

Circuit Judge

Dated: June 24, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1318

TUNIS BROTHERS COMPANY, INC.
de la RIGAUDIERE, RICHARD N. and
SMITH, DAVID C.,

Appellants

v.

FORD MOTOR COMPANY
FORD MOTOR CREDIT COMPANY
WENNER, JOHN S.
CRAWFORD, DOUGLAS N.
FRAHER, EUGENE W.
HASEL, E.S.
NICKEL, HUGH
HARRIS, KENNETH E. and
WENZEL, C.W.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG and HUNTER,
Circuit Judges.

The petition for rehearing filed by defendants/appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judges Weis, Stapleton and Hunter would grant rehearing. Judge Becker would grant rehearing in banc because "the result in this case is inconsistent with" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

BY THE COURT,

_____

Circuit Judge

Dated: August 6, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1797 and 90-1816

TUNIS BROTHERS COMPANY, INC.;
RICHARD N. DE LA RIGAUDIERE; and
DAVID C. SMITH,

vs.

FORD MOTOR COMPANY;
FORD MOTOR CREDIT COMPANY;
WENNER FORD TRACTOR, INC.; JOHN S. WENNER;
JOHN WATSON; DOUGLAS N. CRAWFORD;
EUGENE W. FRAHER; E. S. HASEL; HUGH NICKEL;
KENNETH E. HARRIS; C. W. WENZEL

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY, and
WENNER FORD TRACTOR, INC.,
Appellants in No. 90-1797

TUNIS BROTHERS COMPANY, INC.;
RICHARD N. DE LA RIGAUDIERE; and
DAVID C. SMITH,
Appellants in No. 90-1816

vs.

FORD MOTOR COMPANY;
FORD MOTOR CREDIT COMPANY;
WENNER FORD TRACTOR, INC.; JOHN S. WENNER;
JOHN WATSON; DOUGLAS N. CRAWFORD;
EUGENE W. FRAHER; E. S. HASEL; HUGH NICKEL;
KENNETH E. HARRIS; C. W. WENZEL

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 82-05557)

PRESENT: BECKER, MANSMANN and SCIRICA,
Circuit Judges

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 27, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 27, 1990, be, and the same is hereby reversed insofar as the denial of the motion for judgment n.o.v. as to all of the defendants on the antitrust claim, and only as to Ford Credit only on the fraud claim. It is further ordered and adjudged that the order of the district court denying Ford Motor's motion for judgment n.o.v. on the fraud claim is affirmed. It is therefore, ordered and adjudged that the cause is remanded to the said District Court for a new trial on compensatory damages against Ford Motor on the fraud count. We will vacate the award of punitive damages in its entirety. Costs taxed against the plaintiffs as to their appeal, No. 90-1816. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Clerk

Dated: January 10, 1992

January 3, 1992

Ms. Sally Mrvos, Clerk
United States Court of Appeals
for the Third Circuit
Room 21400 – U.S. Courthouse
Sixth and Market Street
Phila., PA 19106

Re: Tunis Brothers Company v. Ford Motor Company, et al Numbers: 90-1797 and 90-1816

Dear Ms. Mrvos:

I write to bring to the Court's attention what may be an oversight or clerical error with regard to the Court's opinion of December 27, 1991 in the above.

At page forty-two of the opinion, it is stated: "This evidence clearly supports the jury's determination that Ford Motor and Wenner Ford committed a fraud against the Plaintiffs." As is noted on page thirty one of the opinion, only Ford Motor and Ford Credit were found by the jury to have committed fraudulent misrepresentations regarding the Plaintiffs. This is substantiated by the jury in answers to interrogatories as appear at page 3535 of the Appendix, a copy of which is attached. Additionally, the Civil Judgment entered in this matter, a copy of which is also attached, shows an award on Count 5 (the fraud count) as against Ford Motor Company and Ford Motor Credit Company only.

Accordingly, the Court's Order as expressed on pages 63-64, granting a new trial on compensatory damages against Ford Motor and Wenner Ford on the fraud count should be amended. Any new trial on the fraud count should pertain only to Ford Motor. I would respectfully request that the Court amend its Order to correct this oversight.

Very truly yours,

/s/ STEVEN T. STERN
STEVEN T. STERN

STS/gj
enclosures
cc: Arnold Ginsburg, Esquire
Robert C. Heim, Esquire
Mr. John Wenner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC.; RICHARD N. de la RIGAUDIERE; and DAVID C. SMITH,	:	CIVIL ACTION
v.	:	
FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC., and JOHN S. WENNER	:	NO. 82-5557

INTERROGATORIES TO THE JURY
FEDERAL ANTITRUST CLAIM
CONSPIRACY

1(A). Do you find that there was a conspiracy between defendants *Ford Motor Company* and *Wenner Ford Tractor, Inc.* to terminate the authorized Ford tractor dealership of plaintiff Tunis Brothers Company, Inc. and to reject the application of plaintiffs Richard N. de la Rigaudiere and David C. Smith for a new Ford tractor franchise for Tunis Brothers in Kennett Square?

Yes	No
X	

(If your answer is "Yes," answer Question No. 1(B); if your answer is "No," go to Question No. 7.)

1(B). Place a check mark next to the defendant(s) that you find were members of the conspiracy during its course:

A—*Ford Company Interests*		B—*Wenner Ford Interests*	
Ford Motor Tractor Division	X	Wenner Ford Tractor, Inc.	X
Ford Motor Credit Company	X	John S. Wenner	

(If you checked any defendant in Column A *and* any defendant in Column B, answer Question No. 2; if you did not check a defendant in Column A *and* a defendant in Column B, go to Question No. 7.)

ADVERSE IMPACT ON COMPETITION

Relevant Market

2. Do you find the relevant *product* market in this case to be:

(check one)

(a) Ford tractors only — X

or

(b) tractors of all brands — ____

(Answer Question No. 3.)

3. Do you find the relevant *geographic* market in this case to be:

(check one)

(a) the "Kennett Square area" as defined by plaintiffs in their Exhibit P-302 — X

or

(b) all of Chester County, northern Maryland, and northern Delaware as defined by defendants in their colored map Exhibit DF 221 — ____

(Answer Question No. 4.)

4. Did the conspiratorial conduct of the defendants substantially harm competition in the "relevant market?"

X Yes ____ No

(If "Yes," answer Question No. 5; if "No," go to Question No. 7.)

5. Is the harm to competition in the relevant market greater than any beneficial effects on competition in the relevant market?

X (Yes) ___ (No)

(If "Yes," answer Question No. 6; if "No," go to Question No. 7.)

6. Did the defendants' conduct cause injury to any of the plaintiffs?

	Tunis Brothers, Inc.		Richard N. de la Rigaudiere		David C. Smith	
(a) Ford Motor Company	X (Yes)	___ (No)	X (Yes)	___ (No)	X (Yes)	___ (No)
(b) Ford Motor Credit Company	X (Yes)	___ (No)	X (Yes)	___ (No)	X (Yes)	___ (No)
(c) Wenner Ford Tractor, Inc.	X (Yes)	___ (No)	X (Yes)	___ (No)	X (Yes)	___ (No)
(d) John S. Wenner	___ (Yes)	X (No)	___ (Yes)	X (No)	___ (Yes)	X (No)

(Answer Question No. 7.)

STATE TORT CLAIM

7(A). Did any of the defendants secure through fraud the unconditional resignation of Richard M. Tunis contrary to his intention?

X (Yes) ___ (No)

(If your answer is "Yes," answer Question 7(B); if your answer is "No," answer Question No. 8.)

7(B). Check the name of the defendant that your "Yes" answer applies to in Question No. 7(A):

Ford Motor Company	X
Ford Motor Credit Company	
Wenner Ford Tractor, Inc.	
John S. Wenner	

(Answer Question No. 8.)

8(A). Do you find that any defendant defrauded plaintiffs in connection with their application for a new Ford franchise in Kennett Square and for approval by Ford Motor Credit Company?

Yes	No
X	

(If your answer is "Yes," answer Question No. 8(B); if your answer is "No," answer no more questions.)

8(B). Check the name of the defendant that your "Yes" answer applies to in Question No. 8(A):

Ford Motor Company	X
Ford Motor Credit Company	X
Wenner Ford Tractor, Inc.	
John S. Wenner	

FOREPERSON OF THE JURY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TUNIS BROTHERS COMPANY, INC.; RICHARD N. de la RIGAUDIERE; and DAVID C. SMITH,	:	CIVIL ACTION
v.		
FORD MOTOR COMPANY; FORD MOTOR CREDIT COMPANY; WENNER FORD TRACTOR, INC., and JOHN S. WENNER	:	NO. 82-5557

INTERROGATORIES TO THE JURY

ANTI-TRUST CLAIM

1. When plaintiff *Tunis Brothers Company, Inc.* applied for a Ford tractor dealer franchise was it the understanding of plaintiffs:

(Check either A or B)

A. that the tractor dealer franchise would be awarded at the Kennett Square location of *Tunis Brothers Company, Inc.* indefinitely; X

OR

B that the tractor dealer franchise would be awarded at the Kennett Square location of *Tunis Brothers Company, Inc.* for two to three years and then the franchise location would move to the vicinity of Oxford/ Cochranville. ____

(If you checked A, answer Question No. 2; if you checked B, answer Question No. 3.)

2. In what sum has Plaintiff *Tunis Brothers Company, Inc.* suffered damages from loss of profits caused by the failure of defendant Ford Motor Company to grant *Tunis Brothers Company, Inc.* a Ford tractor dealer franchise at its Kennett Square property for an indefinite period commencing April, 1981, but not to exceed ten years?

$227,605.50

(Answer Question No. 4.)

3. In what sum has plaintiff *Tunis Brothers Company, Inc.* suffered damages from loss of profits caused by the failure of defendant Ford Motor Company to grant *Tunis Brothers Company, Inc.* a Ford tractor dealer franchise at its Kennett Square property for the two to three year period following April, 1981?

$_____

(Answer Question No. 4.)

STATE CLAIM

4. In what sum is *Tunis Brothers Company, Inc.* entitled to recover damages on its claim based on fraud against the below named defendants:

Ford Motor Company	$159,323.85
Ford Motor Credit Company	$ 68,281.65

(Answer Question No. 5.)

5. In what sum, if any, is *Tunis Brothers Company, Inc.* entitled to recover punitive damages from the below named defendants:

Ford Motor Company	$2.8 Million
Ford Motor Credit Company	$1.2 Million

_____

FOREPERSON OF THE JURY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 5, 1991

NOS. 90-1797/1816

TUNIS BROTHERS COMPANY, INC., et al.
vs.
FORD MOTOR COMPANY, et al.
Ford Motor Company, Ford Credit Company
and Wenner Ford Tractor, Inc.,
Appellants-cross-appellees
(E.D. of PA Civil No. 82-05557)

Present: BECKER, MANSMANN and SCIRICA, *Circuit Judges.*

Motion by appellees-cross-appellants, Tunis Brothers Company, Inc., Richard N. de la Riguadiere and David C. Smith, for leave to file "Memorandum of Tunis Brothers Company, Inc., et al. Confirming and Documenting Responses of Their Counsel to Certain Inquiries of the Court at Oral Argument,"

Copy of memorandum of appellees-cross-appellants confirming and documenting responses of their counsel to certain inquiries of the Court at oral argument, sent for the Court's information,

/s/ BOBBI WEAVER
Deputy Clerk 7-3080

Case was argued 6-27-91.
Two copies of memorandum attached.

O R D E R

The foregoing Motion is denied.

By the Court,

/s/ CAROL LOS MANSMANN
Circuit Judge

Dated: July 16, 1991

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

SALLY MRVOS
CLERK

FOR THE THIRD CIRCUIT

TELEPHONE
215-597-2995

21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

October 23, 1991

Robert C. Heim, Esquire
Dechert, Price & Rhoads
1717 Arch Street
4000 Bell Atlantic Tower
Philadelphia, PA 19103

Steven T. Stern, Esquire
Rosenwald & Pollack
1735 Market Street
Mellon Bank Center, 39th floor
Philadelphia, PA 19103

Re: Tunis Bros. Co. v. Ford Motor Co., et al.
Nos. 90-1797 and 90-1816

Dear Counsel:

This will confirm our telephone call to each of you today. The Court wishes you to supply it with four (4) copies of all your motions (with supporting legal memoranda) for judgment n.o.v. or a new trial. These should be received in the Clerk's office by Monday, October 28, 1991.

Very truly yours,
SALLY MRVOS, Clerk

By:_____
Chief Deputy Clerk

MEF/af
cc: Arnold Ginsburg, Esquire

LAW OFFICES
ARNOLD R. GINSBURG
500 COLLEGE AVENUE
HAVERFORD, PENNSYLVANIA 19041
215 649-2929

October 25, 1991
Delivered

Ms. M. Elizabeth Ferguson
Chief Deputy Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
Philadelphia, Pa. 19106

Re: Tunis Brothers Company, Inc., et al.
v. Ford Motor Company, et al.
Nos. 90-1797 and 90-1816

Dear Ms. Ferguson:

I have received a copy of your letter, dated October 23, 1991, addressed to Robert C. Heim and Steven T. Stern, Esquires, attorneys for the defendants/appellants in the above case, stating that the Court wishes them to supply it with copies of their motions (with supporting legal memoranda) for judgment n.o.v. or a new trial.

Would the Court want me to supply copies of the legal memoranda or briefs in opposition to those motions filed on behalf of the plaintiffs with the District Court? If so, this Court would then have before it the same legal memoranda, pro and con, which Judge Bechtle had before him and which he considered when he denied those motions.

Please let me know.

Sincerely yours,

/s/ Arnold R. Ginsburg
Arnold R. Ginsburg

ARG:LS

cc: Robert C. Heim, Esquire
Steven T. Stern, Esquire

(3)

Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

No. 91-1809

IN THE

Supreme Court of the United States

October Term, 1991

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,
Petitioners

v.

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and WENNER FORD TRACTOR, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

ARNOLD R. GINSBURG
500 College Avenue
Haverford, Pennsylvania 19041
(215) 649-2929
Attorney and Counsel of Record for Petitioners

June 12, 1992

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

Respondents' last-minute waiver of their right to respond to our Petition for Writ of Certiorari "unless requested to do so by the Court" is a new and unexpected development which requires special comment by petitioners in this Supplemental Brief.

Petitioners Tunis Brothers Company, Inc., *et al.* filed and served their Petition for Writ of Certiorari on May 11, 1992. Under this Court's Rule 15.2, respondents had until June 10, 1992 to file their Brief in Opposition.

By letter to the Clerk of the Court, dated June 8, 1992 and mailed by Federal Express, the attorney for respondents Ford Motor Company and Ford Motor Credit Company stated: "Respondents believe the petition to be meritless and, therefore, waive the right to respond to it unless requested to do so by the Court. I understand that it is the Court's practice not to grant a petition without first requesting respondents to submit a brief in opposition. I trust therefore that the Court will contact me if they wish respondents to submit a brief." In an almost identical letter, dated June 9, 1992 and mailed "via UPS overnight", the attorney for respondent Wenner Ford Tractor, Inc. informed the Court that Wenner Ford "believes that the Petition is without merit and, therefore, waives its right to respond to the Petition unless instructed to do so by the Court."

By engaging in such certiorari brinkmanship, which invites adverse consequences for respondents, their unwillingness to file a brief in opposition to our Petition unless "requested" or "instructed" to do so by the Court is neither courteous nor helpful to the Court and its law clerks. Even more seriously, respondents' unwillingness and waiver constitute a flagrant disregard of this Court's comparatively new Rule 15.1, effective January 1, 1990, stating:

> A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting

> the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

In R. Stern, E. Gressman & S. Shapiro, *Supreme Court Rules: The 1990 Revisions* 15 (1990), the authors of *Supreme Court Practice* (6th ed. 1986) state in part: "Rule 15, which replaces former Rule 22, governs the brief in opposition to certiorari, as well as reply briefs and supplemental briefs. There are no significant changes in the procedure for filing such briefs. But there is one *significant piece of advice* given to counsel for a respondent, advice which is contained in Rule 15.1 and *has no past counterpart*: [Rule 15.1 quoted]. This new provision or admonishment codifies the practice announced by the Court in *Oklahoma City v. Tuttle*, 471 U. S. 808, 815-16 (1985). Counsel for all parties, but especially counsel for the respondent, should read and absorb the lesson taught by that decision. That lesson was reiterated more recently in *Canton v. Harris*, 109 S. Ct. 1197, 1202-1203, 57 U.S.L.W. 4270, 4272 (1989)." (Emphasis added.)

In view of the Court's current Rule 15.1 it is very doubtful whether respondents can safely rely upon what

they refer to as "the Court's practice not to grant a petition [for certiorari] without first requesting respondents to submit a brief in opposition". Since such an alleged practice will encourage respondents to refrain from filing briefs in opposition unless and until the Court expressly requests or instructs respondents to file in specific cases, and since such a practice would defeat the purpose and intent of Rule 15.1, it is respectfully submitted that such a practice should be discontinued if, in fact, it does exist. As Rule 15.1 emphasizes: **"A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction . . . Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later."**

Rule 44.3 provides that "No response to a petition *for rehearing* will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response." If the Court wanted respondents to waive their right to file briefs in opposition to certiorari petitions unless and until the Court requested otherwise, it would have so provided in Rule 15. This it did not do. Indeed, Rule 15.1 emphasizes the "important purpose" of a brief in opposition.

In fact, Rule 15.1 is not only a "request" but an "instruction" by the Court to respondents that they should file a brief in opposition to our Petition within the time specified by Rule 15.2. For respondents to ignore this "request" and "instruction" and to waive the right to respond to the Petition "unless requested [or "instructed"] to do so by the Court" — to "trust . . . that the Court will contact [respondents' counsel] if they wish respondents to submit a brief" — is nothing less than brazen effrontery.

Is it possible that respondents *really* believe that our Petition for Writ of Certiorari is "meritless" or "without merit" as their letter waivers state? The very important "Questions Presented" by the Petition in light of the

facts presented therein are clearly certworthy. This antitrust and fraud case has been in litigation since 1982, has been the subject of review by the Third Circuit three times, and has been before this Court twice before on *respondents'* petitions for certiorari. Beyond that, our Petition speaks for itself.

And if respondents *really* believe that our Petition is "meritless" or "without merit", why did they wait until the 29th and 30th days before so informing the Court and waiving their right to file a brief or briefs in opposition?

Is it not more likely that respondents have discovered no valid reasons for opposing certiorari and therefore prefer to remain silent? Do respondents find it impossible to defend the very confused opinion and erroneous decision of the Third Circuit? Do respondents fear that any brief in opposition filed by them would only provide petitioners with the opportunity to file a very strong Reply Brief?

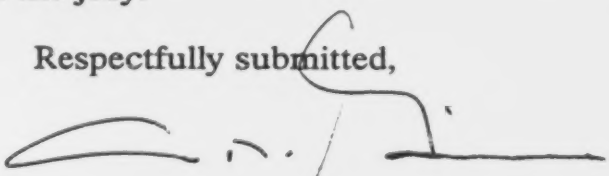
Is it possible that respondents filed their letter waivers at the last minute because they were not satisfied with the brief or briefs in opposition upon which they have been working and, in an effort to buy more time to strengthen their arguments, they elected to waive their right to file briefs in opposition now in reliance upon what they understand to be "the Court's practice not to grant a petition without first requesting respondents to submit a brief in opposition"?

Since respondents have, in effect, pleaded a civil kind of *nolo contendere* by waiving their right to file a brief in opposition, and in view of Rule 15.1, respondents have conceded that they perceive no "misstatements of fact or law set forth in [our certiorari] Petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted". By their waiver, respondents have also conceded that there are no other misstatements of fact or law in our Petition.

CONCLUSION

For the reasons stated in our Petition for Writ of Certiorari and herein, petitioners respectfully submit that the Court should grant this Petition, without *further* requesting or instructing respondents to submit a brief in opposition, so that the Court may, without further delay, consider the questions presented, correct the errors of the court below in the interest of justice, affirm the district court's decision in all respects, and help safeguard the constitutional guarantee of trial by jury against judicial erosion through interference with the proper function of the jury.

Respectfully submitted,



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